Kyle J. Steinberg

1009 18th Ave SE, Minneapolis, MN 55414 • stei1228@umn.edu • 952-688-2131

June 12, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19106
Dear Chief Judge Sánchez,

I am a third-year student at the University of Minnesota Law School, and I am excited to be considered for a clerkship in your chambers for the 2024-25 term, following my graduation. I am a strong candidate for this position based on my excellent legal research and writing skills as demonstrated through my employment and moot court experiences, along with my passion for public interest work.

As a Twin Cities native, George Floyd's murder spurred a years-long span of learning and listening for me, and it's something that I hope never stops. I am committed to becoming a public interest attorney not because of personal trauma, but because I believe every person deserves to have the same "basic" privileges I enjoyed growing up—sports to keep me active, instruments to foster creativity, and no worry of where or when my next meal would be. I am eager to hear about your experiences working in both plaintiff-side public interest law as well as public defense—these are the two areas of law I wish to pursue. Further, the opportunity to learn from attorneys arguing before the court is a valuable one—I view this clerkship as a duty not only to assist the court in administering justice, but also a learning experience to become a strong advocate for any future clients I may have.

While I certainly have much to learn from a clerkship in your chambers, I also have much to contribute. I have expanded upon a strong legal research and writing foundation established in my first year. After receiving an "Honors" grade in my first-year Legal Research and Writing course, I continued developing my legal writing skills through intensive brief-writing experiences in my second-year moot courts. During my Civil Rights and Civil Liberties in-house moot court, I argued for the plaintiffs/petitioners a violation of their First Amendment right to record police at a protest. My brief was nominated as the best in my section of the course. Additionally, I represented the University of Minnesota Law School in the ABA National Appellate Advocacy Competition this spring, arguing another First Amendment issue. I truly enjoy researching and writing about legal issues, and a clerkship in your chambers would allow me to exercise my writing skills across new areas of the law.

Further, my professional experiences have prepared me well to serve as your clerk. Last summer, I served as a Legal Intern with the First Amendment Clinic at the University of Georgia School of Law. I took on a significant workload and gained a great deal of litigation experience in just ten short weeks. I drafted answers to interrogatories, researched and drafted an opposition argument to a motion from opposing counsel, researched varying legal issues and presented my findings through internal memos, took part in deposition strategy meetings, and sat in on the depositions themselves. I continued my commitment to public interest work during the last academic year through a pro bono clerkship with a large law firm. I had broad exposure across a variety of matters that included intensive research as well as client-facing work and interviewing potential witnesses. I am building further upon my experiences this summer with the Federal Public Defender for the District of Kansas, where I have already experienced client intake, interacted with judges and prosecutors, and watched and contributed to a trial. Each of these experiences has allowed me to develop my legal writing and advocacy skills along with learning what the practice of law truly entails, while developing the maturity that is necessary to aid in legal proceedings.

Enclosed you will find my resume, writing sample, transcripts, and letters of recommendation from Professor Clare Norins, Adjunct Professor Halla Elrashidi, and Victoria Brenner. Thank you for considering my application and I look forward to hearing from you soon.

Sincerely,

Kyle J. Steinberg

Kyle J. Steinberg

1009 18th Ave SE, Minneapolis, MN 55414 • stei1228@umn.edu • 952-688-2131

EDUCATION

University of Minnesota Law School, Minneapolis, MN
J.D. Anticipated, May 2024
American Bar Association National Appellate Advocacy Moot Court Competition Team (2022-23)
GPA: 3.208/4.333
Awards: Legal Research and Writing Section C34 Best Oralist; Clary Cup oral argument semifinalist; Honors in Legal Research and Writing; Honors in Law in Practice; Best Brief nominee, Civil Rights and Civil Liberties Moot Court
Activities: Sports Law Association; Fighting Mondales Ice Hockey (Co-Captain)
Clinics: Criminal Defense Clinic (2022-23)

University of Minnesota - Curtis L. Carlson School of Management, Minneapolis, MN
Bachelor of Science in Business, Finance, 2020
GPA: 3.194/4.000
Honors: Securian Ethics Essay Competition scholarship winner
Activities: Undergraduate Ambassador; International Business Association; GLOBE
Study Abroad: Spring semester, Lyon, France, 2019

EXPERIENCE

Federal Public Defender, District of Kansas, Kansas City, KS
Third Chair Intern, May 2023 – July 2023

Taft Stettinius & Hollister LLP, Minneapolis, MN
Pro Bono Law Clerk, September 2022 – April 2023
Conducted legal research and ad-hoc projects on pro bono matters across all offices of the firm. Projects included unlawful search and seizure research, drafting documents and correspondence for a marriage dissolution, and docket research for prisoner abuse cases. Certified as a supervised student practitioner under Minnesota law.

University of Georgia School of Law, First Amendment Clinic, Athens, GA
Law Intern, May 2022 – July 2022
Supported clinic director and attorney fellow in Federal District Court civil rights litigation. Drafted answers to interrogatories. Conducted legal research; drafted memoranda to formulate legal direction of cases. Drafted oppositions to motions. Contributed to discussions on deposition strategy and attended depositions.

Tax Sheltered Compensation, Inc., Edina, MN
Retirement Plan Compliance Technician, June 2020 – June 2021
Ensured structure and documentation of retirement plan offerings of small and mid-size firms complied with relevant legislation and regulations. Participated in enrichment activities to deepen exposure to ERISA law.

TransPerfect Translations, Minneapolis, MN
Sales Intern, June 2019 – August 2019
Managed robust portfolio of over 70 clients to ensure translation needs were met. Engaged in frequent communication with both production teams and clients to determine most effective ways to meet business goals.

The Minnesota Daily, Minneapolis, MN
Sports Reporter, January 2017 – April 2017
Created weekly features for university's wrestling and softball teams. Experienced a fast-paced media environment.

ADDITIONAL

Interests: Watching and playing most sports, collecting vinyl records and attending concerts, hiking, fishing

UNIVERSITY OF MINNESOTA
OFFICE OF THE REGISTRAR

TRANSCRIPT RECORD

Law School Official

Name : Steinberg,Kyle J
Student ID : 5259580
Birthdate : 12 - 20

Print Date: 06/11/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities
Program : Law School
Plan : Law J D
Degree Sought : Juris Doctor

Student also has transcripts from the University of Minnesota at level(s):
Undergraduate

* * * * * **Beginning of Law Record** * * * * *

Fall Semester 2021
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6001	Contracts	4.00	4.00	B+	13.332
LAW	6002	Legal Research & Writing	2.00	2.00	H	0.000
LAW	6005	Torts	4.00	4.00	B	12.000
LAW	6006	Civil Procedure	4.00	4.00	B	12.000
LAW	6007	Constitutional Law	3.00	3.00	B	9.000
TERM GPA :	3.089	TERM TOTALS :	17.00	17.00	15.00	46.332

Spring Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6002	Legal Research & Writing	2.00	2.00	H	0.000
LAW	6004	Property	4.00	4.00	B-	10.668
LAW	6009	Criminal Law	3.00	3.00	B-	8.001
LAW	6013	Law in Practice: 1L	3.00	3.00	H	0.000
LAW	6018	Legislation and Regulation: 1L	3.00	3.00	B	9.000
TERM GPA :	2.767	TERM TOTALS :	15.00	15.00	10.00	27.669

Fall Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6085	Criminal Procedure: Investigtn	3.00	3.00	B+	9.999
LAW	6219	Evidence	3.00	3.00	C+	6.999
LAW	6632	Employment Law	3.00	3.00	B	9.000
LAW	7048	Moot Court Competition Team	1.00	1.00	A	4.000
Course Topic:		ABA Moot Court				
LAW	7055	Civil Rights/Liberties Moot Ct	1.00	1.00	A	4.000
LAW	7500	CL: Criminal Defense	2.00	2.00	A	8.000
TERM GPA :	3.231	TERM TOTALS :	13.00	13.00	13.00	41.998

Spring Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6084	Equal Protection	3.00	3.00	A-	11.001
LAW	6631	Employment Discrimination	3.00	3.00	B	9.000
LAW	6650	Advanced Administrative Law	3.00	3.00	B+	9.999
LAW	6915	Race and the Law	2.00	2.00	A	8.000
LAW	7048	Moot Court Competition Team	1.00	1.00	A	4.000
Course Topic:		ABA Moot Court				
LAW	7055	Civil Rights/Liberties Moot Ct	1.00	1.00	A	4.000
LAW	7500	CL: Criminal Defense	2.00	2.00	A	8.000
TERM GPA :	3.600	TERM TOTALS :	15.00	15.00	15.00	54.000

Fall Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6051	Business Associations/Corps	4.00	0.00		0.000
LAW	6100	Basic Federal Income Tax	3.00	0.00		0.000
LAW	6618	Trial Practice	3.00	0.00		0.000
LAW	6665	PR - Government	3.00	0.00		0.000
LAW	7056	Civil Rights Moot Court Dir.	1.00	0.00		0.000
TERM GPA :	0.000	TERM TOTALS :	14.00	0.00	0.00	0.000

Law Career Totals
CUM GPA: 3.208 UM TOTALS: 74.00 60.00 53.00 169.999
UM + TRANSFER TOTALS: 60.00

***** End of Transcript *****

Kyle Steinberg
208 Geneva Boulevard
Burnsville MN 55306

In accordance with the Family Educational Rights and Privacy Act of 1974, non-public information about a student will not be released to a third party without written consent of the student.

Stacey Tidball
Associate Vice Provost & University Registrar
University of Minnesota, Twin Cities

Transcript Key

Academic calendar

The semester system started Fall 1999 for all University of Minnesota campuses. Prior to Fall 1999 the University used a quarter system with these exceptions: Law school started on semesters Fall 1981, and some College of Continuing Education courses were taught on a semester calendar but the credits reported as quarter credits.

Accreditation

The University of Minnesota is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools.

Course (class) numbering system (from Fall 1999)

0000 to 0999 remedial courses
1000 to 1999 primarily for undergraduates in first year
2000 to 2999 primarily for undergraduates in second year
3000 to 3999 primarily for undergraduates in third year
4000 to 4999 primarily for undergraduates in fourth year, may be applied to a Graduate School degree with approval by the student's major field and if taught by a member of the graduate faculty or an individual authorized by the program to teach at the graduate level
5000 to 5999 primarily for graduate students but third and fourth year undergraduates may enroll
6000 to 7999 for post-baccalaureate professional degree students
8000 to 9999 for graduate students

Prior course numbering systems

For Fall 1970 through Summer 1999 (course numbering prior to 1970 is noted in parentheses):
0000 to 0999 noncredit courses
1000 to 1999 (01 - 49) introductory courses primarily for freshmen and sophomores
3000 to 3999 (50 - 99) intermediate courses primarily for juniors and seniors
5000 to 5999 (100 - 199) advanced courses for juniors, seniors, and graduate students
8000 to 8999 (200 and higher) for graduate and professional school students

Credit

Starting Fall 1999 – units are semester credit
Prior to Fall 1999 – units generally are quarter credit (see calendar for exceptions)
Thesis credit – an asterisk (*) will appear following the course title of courses numbered 8777, 8888, or 8999 if the degree award is shown
An asterisk (*) indicates graduate credit taken though College of Continuing Education (Continuing Education and Extension prior to Fall 1999)

Grading policy (complete)

Available online at policy.umn.edu/Policies/Education/Education/GRADING TRANSCRIPTS.html

Grading definitions

A – achievement that is outstanding relative to the level necessary to meet course requirements
B – achievement that is significantly above the level necessary to meet course requirements
C – achievement that meets the course requirements in every respect
D – achievement that is worthy of credit even though it fails to meet fully the course requirements
E – achievement that is significantly greater than the level required to meet the basic course requirements but not judged to be outstanding
F (or N) – represents failure (or no credit) and signifies that the work was either (1) completed but at a level of achievement that is not worthy of credit or (2) was not completed and there was no agreement between the instructor and the student that the student would be awarded an I (see also I)
H – Honors (used by Law School and Medical School only)
I – (Incomplete) assigned at the discretion of the instructor when, due to extraordinary circumstances, e.g., hospitalization, a student is prevented from completing the work of the course on time. Requires a written agreement between instructor and student
K – assigned by an instructor to indicate the course is still in progress and that a grade cannot be assigned at the present time
LP - low pass (used by Law School only)
NG – no grade required
NR - grade not reported
O – represents outstanding achievement for Doctor of Medicine and Doctor of Veterinary Medicine programs
P – achievement designating passing work
Q – achievement designating passing work
R – a course related registration symbol
S – achievement that is satisfactory, which is equivalent to a C- or better for undergraduate students (C or better on the Duluth campus). Graduate and professional programs may establish higher standards for earning a grade of S.
T – test credit
V – registration as an auditor or visitor (a non-grade non-credit registration)
W – entered by the registrar's office when the student officially withdraws from a course after the second week
X – reported by the instructor for a student in a sequence course where the grade cannot be determined until the sequence is complete – the instructor is to submit a grade for each X when the sequence is complete
Y – assigned from Fall 1929 to Summer 1959 to indicate the student canceled while doing passing work
Z – assigned from Fall 1929 to Summer 1959 to indicate the student canceled while doing failing work

On the Twin Cities campus from Fall 1972 through Summer 1977 and on the Morris campus from Fall 1972 through Summer 1985, the official University transcript included only positive academic achievements. Courses in which the student received a grade of N or a registration symbol of I or W did not appear on the transcript.

Grade/Numeric Point Average formula

Effective Fall 1997, grade point values were standardized for the University. All units except Law use: A = 4.000, A- = 3.667,B+ = 3.333, B = 3.000, B- = 2.667, C+ = 2.333, C = 2.000, C- = 1.667, D+ = 1.333, D = 1.000, F = 0.000, I = 0.000, K = 0.000, X = 0.000. Effective Fall 2004, the Twin Cities campus Law School uses University standard grading, with the addition of A+ = 4.333 and excluding D+.
Before 1997, most units did not use +/-. But the Duluth campus and the School of Management used: A = 4.0, A- = 3.6, B+ = 3.3,
B = 3.0, B- = 2.6, C+ = 2.3, C = 2.0, C- = 1.6, D+ = 1.3, D = 1.0,
F = 0.0 and the Twin Cities General College used A = 4.0,
A- = 3.6, B = 3.2, B- = 2.8, C+ = 2.4, C = 2.0, C- = 1.6, D = 1.2, D- = 0.8, F = 0.0
Prior to Fall 2004, the Twin Cities campus Law School used a numeric rather than a grade point average for the *juris doctor (J.D.)* degree program. Grades ranged from 4-16 points based on the following: 14-16: Excellent/Outstanding; 11-13: Substantially better than average; 8-10: Minimally acceptable; 5-7: Inadequate (credits count towards degree completion, and NPA); 4: Failing; 0: Non-performance. Classes for which a 0 grade was earned are not included in NPA calculation. Grades earned in the *LL.M.* (Master of Laws) program were: A=4.00, B=3.00, C=2.00, D=1.00, F=0.00. No +/- distinctions are given.

Symbols following course numbers

C – certificate credit
E – on Duluth campus, registration in Continuing Education, or on Twin Cities campus, an MBA course
G – honors course for extra credit
H – honors course
J – evening MBA course for extra credit
K – evening MBA course by independent study
L – honors course by independent study
M – extra credit by independent study
Q – evening MBA extra credit by independent study
R – honors extra credit by independent study
S – semester registration (pre-1999)
T – semester honors course (pre-1999)
U – special term course taken for extra credit
V – honors and writing intensive
W – writing intensive
X – extra credit
Y – independent study
Z – special term registration

Additional notations

Canceled means that all course registration was canceled (i.e., dropped) before the end of the second week of the term.

Degree with distinction indicates graduation with high GPA; **degree with honors** (laude) indicates completion of honors program.

Second Language Proficiency means demonstrated intermediate proficiency in reading, writing, listening, and speaking.

For more information, visit www.umn.edu

Campus Records office locations:

University of Minnesota, Crookston
9 Hill Hall
Crookston, MN 56716-5001
218-281-8548
Dept of Educ Inst cd: 004069

University of Minnesota, Duluth
184 Darland Administration Building
Duluth, MN 55812-3011
218-726-8000
Dept of Educ Inst cd: 002388

University of Minnesota, Morris
212 Behmler Hall
Morris, MN 56267-2132
320-589-6030
Dept of Educ Inst cd: 002389

University of Minnesota, Twin Cities
333 Bruininks Hall or 130 Coffey Hall or 130 West Bank Skyway
Minneapolis, MN 55455 | St. Paul, MN 55108 | Minneapolis, MN 55455
612-624-1111 | 612-624-1111 | 612-624-1111
Dept of Educ Inst cd: 003969

University of Minnesota, Rochester
111 South Broadway
Rochester, MN 55904
507-258-8457
Dept of Educ Inst cd: 003969

The University of Minnesota, Waseca campus closed in 1992. For information on Waseca student transcripts, contact a Twin Cities office.

Taft/

2200 IDS Center, 80 South 8th Street
Minneapolis, MN 55402-2210
Tel: 612.977.8400 | Fax: 612.977.8650
taftlaw.com

Affirmative Action, Equal Opportunity Employer

Victoria J. Brenner
612.977.8737
VBrenner@taftlaw.com

April 27, 2023

VIA E-MAIL

To Whom It May Concern:

Re: Kyle Steinberg

Dear Sir or Madam:

It is with great pleasure that I recommend Kyle Steinberg as a law clerk or associate attorney. I had the fortune of working with Kyle on a difficult pro bono marital dissolution case at Taft and was consistently impressed with his sharp legal instincts. These instincts appeared in his superb drafting skills, where he decided what was relevant and what was not in presenting to me, and the mediator, the relevant facts and context of the case.

Kyle did an excellent job issue-spotting and asking relevant questions regarding the client and his case. He also paid a great deal of attention to the details presented in the case and drafted a proposed property settlement. Kyle and I had a great deal of back-and forth as we prepared for trial on the case.

Kyle works well independently and asks the right questions in an organized manner. He also uses good judgment with client matters. Kyle's interactions and client handling was always thoughtful and appropriate. After observing this about him, I asked him to call a potential witness in our case to vet a legal theory that the witness might have been useful in proving. He provided me with an excellent written report including his opinion about the efficacy of my proposed legal theory with this witness' information. Again, his instincts were solid regarding the questions asked in that interview and also in how he shared the information with me.

Since Kyle was not in our office every day of the week, he was conscientious about informing me about his schedule and was proactive in communicating with me about the status of his case projects.

In addition to being intelligent and organized, Kyle has also demonstrated superb people skills, both with me, my staff and my client. I have been impressed with Kyle throughout the entirety of the case and know that he will be highly valued by those fortunate to work with him.

Sincerely,

TAFT STETTINIUS & HOLLISTER LLP

/s/ Victoria J. Brenner

Victoria J. Brenner

VJB:egs

77027165v4

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is with great pleasure I recommend Kyle Steinberg for a judicial clerkship. I was fortunate to have Kyle in my 2022-2023 Civil Rights and Civil Liberties Moot Court section at the University of Minnesota Law School. Kyle is a skillful writer and will make an exceptional law clerk.

Kyle's written work for the course included an appellate brief, which I awarded as the Best Appellate Brief from my section. His brief was well-researched and well-organized, and exhibited his aptitude for legal writing, research, and analysis. He has an excellent ability to synthesize case law and clearly explain complex legal concepts in a simplified, effective, and concise manner.

Throughout the course, Kyle demonstrated his commitment to academic excellence through thoughtful and articulate contributions to class discussions. He demonstrated a keen interest in learning and dedication to advocacy. The course focused on issues related to civil rights and civil liberties and Kyle's tenacity to understand the many facets of the law was remarkable. He quickly identified relevant law and facts, which helped other students formulate arguments or better understand counterpoints.

I genuinely enjoyed working with Kyle and was consistently impressed with his work. He is personable, diligent, and reliable. I am confident he will be an exceptional law clerk.

Please do not hesitate to contact me with any questions.

Sincerely,

Halla Elrashidi (She/Her)
Adjunct Professor
Civil Rights Civil Liberties Moot Court

Halla Elrashidi - elra0004@umn.edu

UNIVERSITY OF GEORGIA
School of Law
First Amendment Clinic

P.O. Box 388
Athens, Georgia 30603
TEL: 706.227.5421
FAX: 706.227-5440

April 5, 2023

Dear Judge:

I write with pleasure to recommend Kyle Steinberg for a clerkship in your chambers. I had the opportunity to work with and supervise Kyle as a full-time summer legal intern in the University of Georgia School of Law's First Amendment Clinic. I found his work to be exceptional, and he, as a person, is a delight

Over the course of the summer Kyle focused on conducting discovery and related motion practice in a § 1983 retaliatory prosecution case. He also handled multiple intakes with prospective clients, providing them with legal research and consultation on their presented issues.

Most importantly for a clerkship, Kyle is a highly effective legal researcher and writer. He is able to quickly orient himself to unfamiliar areas of the law, and then correctly apply that law to the facts of a case – doing so in a clear and succinct manner. Kyle works very independently, requiring minimal oversight, but is not afraid to seek guidance or ask for clarification when needed. He also readily absorbs and implements verbal and written feedback, making for easy communication and supervision.

Kyle is professional, personable, and focused. He got along well with both very strong, and more reserved, personalities who he encountered among the people in the clinic and our clients. Kyle is also quietly adventurous. During his summer in Georgia, he was always highly productive at work but, on weekends, took multiple solo trips to explore the southeast, demonstrating his desire to fully experience and take advantage of any given opportunity. Transferring those qualities to a clerkship setting, he will be eager to work on as many cases, and observe and assist with as many court proceedings, as possible.

And while he is a hard-worker, as noted, Kyle maintains a healthy balance of recreational interests and pursuits (for instance, he was also training for a marathon during his internship and exploring the local music scene), which makes him a well-rounded and engaging person with whom to work.

Given Kyle's combination of astute legal skills, strong work ethic, and ability to relate well with others, I have no doubt that he would make an immensely valuable contribution to the work of your chambers.

Sincerely,

Clare R. Norins

Clare R. Norins
Assistant Clinical Professor
First Amendment Clinic Director

Kyle J. Steinberg
1009 18th Ave SE, Minneapolis, MN 55414 • stei1228@umn.edu • 952-688-2131

Writing Sample

This writing sample is a persuasive brief from my second-year Civil Rights and Civil Liberties moot court course. This brief is my own work, with light edits made by only myself after receiving feedback from my instructors. My writing is based on a purely hypothetical fact pattern; any names, places, or courts referenced are not representative of real people or entities.

In this brief, I represented a group of appellants who filed an appeal to reverse the judgment of the district court below, which granted summary judgment to the appellees here. I argue that the record indicates sufficient evidence for trial on both of appellants' claims—a violation of their right to record the police, and a retaliatory arrest effected by the police against appellants' First Amendment rights.

I researched and analyzed the record, the First Amendment to the United States Constitution, and extensive case law to develop my argument. This writing sample represents my best work. All fonts and formatting are in accordance with the local rules specified in the assignment. I have redacted portions of the brief, including the caption, tables of contents and authority, statement of the issues, summary of the argument, and large portions of the second issue, to meet the 15-page limit for the writing sample.

Statement of the Case

The City of Libertyville Proposed a Tax Levy That Generated Passionate Debate Among its Citizens.

In 2021, the City of Libertyville was considering imposing a sizeable tax levy on its citizens as a means of paying for technology improvements. (R. at 4; Compl. ¶8). This proposal evoked substantial reaction from the citizens of Libertyville—people on both sides of the issue spoke in support or disfavor of the levy. (R. at 5; Compl. ¶9).

Appellants are members of a group who protested the passage of the levy. (R. at 7; Compl. ¶16). They made their voices heard through online postings—videos and text—as well as an in-person protest at City Hall on August 22, 2021, the day that the school board voted on the levy. *Id.*

To accommodate all views on the levy, city officials and the Libertyville police arranged a protest location outside of City Hall on the day of the vote. (R. at 10; Compl. ¶28). The arrangement included a walkway into city hall surrounded by barricades on either side—one side was designated for proponents of the levy, while the other was reserved for protestors against the levy. (R. at 10; Compl. ¶29). The goal of this design was to protect the safety of the school board members as they entered and exited city hall while providing citizens space to exercise their views on the levy. *Id.*

In preparation for the protest, the Libertyville Police Department held a planning meeting to discuss strategies to contain the crowd. (R. at 8; Compl.

¶21). During the meeting, officers were explicitly instructed to respect the First Amendment rights of the protestors, including their right to record. *Id.* The officers were also shown videos of select protestors who were identified as potential "troublemakers" and told to keep an eye out for those individuals in the interest of maintaining a safe protest. (R. at 9; Compl. ¶25). Appellee, Officer Mia Johnson, is a police officer with the City of Libertyville and was present at this planning meeting. (R. at 8; Compl. ¶23).

Appellants Were Arrested for Recording the Actions of the Police at the Protest

On the evening of the school board meeting, there were many protestors on each side of the crowd. (R. at 10; Compl. ¶32). Officer Johnson was assigned to the Appellants' side of the protest. (R. at 11; Compl. ¶36). As the meeting progressed, the crowd grew louder as the protestors made their views clear to the other side. (R. at 11; Compl. ¶34). After the school board denied the levy, Appellants celebrated the outcome and became more vocal towards the other group of protestors. (R. at 11; Compl. ¶35). During this wave of emotion, Appellants' group of protestors moved forward, crossing the barricade into the walkway area. *Id.* Appellee aggressively ordered Appellants to return to their assigned place behind the barricade, and Appellants did so without issue. (R. at 12; Compl. ¶¶38-39). No arrests were made at that time. (R. at 12; Compl. ¶42).

Pro-levy protestors on the other side of the walkway became agitated and started to taunt and verbally harass Appellants and their fellow anti-levy protestors. (R. at 12; Compl. ¶40). Several pro-levy protestors breached their barricade. (R. at 12; Compl. ¶43). The police officers on that side of the protest calmly ushered the pro-levy group back behind their barricade without making physical contact. (R. at 13; Compl. ¶43).

To document the more favorable treatment the pro-levy group received from police, Appellants pulled out their phones and began to record the events. (R. at 13; Compl. ¶45). In an effort to establish a better recording angle, Appellants inadvertently knocked over their barricade and temporarily advanced past their boundaries. (R. at 13; Compl. ¶47). Officer Johnson once again aggressively ordered Appellants back behind their barricade, and Appellants once again immediately complied. (R. at 14; Compl. ¶¶50-51). Officer Johnson and the other officers on scene were aware that Appellants were recording them. (R. at 14; Compl. ¶49).

After the Appellants had retreated behind their barricade and while they continued to record the police, Officer Johnson then decided to arrest them. (R. at 15; Compl. ¶¶54-55). During the arrest, at least one appellant heard Officer Johnson say something to the effect of "maybe you'll stop making videos now." (R. at 15; Compl. ¶56). Officer Johnson indicated that the arrests were for criminal misdemeanor trespass under Moot State Statute § 78.25.

Police made nine arrests during the protest—six of which were Appellants. (R. at 16; Compl. ¶63). The other three arrests were pro-levy protestors from the other side of the protest. (R. at 17; Compl. ¶69). Only one pro-levy protestor had been branded as a "troublemaker" prior to the protest. Predictably, Officer Johnson hold pro-levy views, which had been made public on social media prior to the protest. (R. at 18; Compl. ¶74).

Procedural History

The city attorney dismissed all criminal charges against Appellants. (R. at 18; Compl. ¶76). Following this, Appellants filed suit in United States District Court for the District of Moot, alleging violation of and retaliation in accordance with Appellants' First Amendment rights. The District Court granted Appellees' motion for summary judgment, granting Officer Johnson and the City of Libertyville a complete defense of qualified immunity on both claims. (R. at 75). Appellants file this timely appeal.

Summary of the Argument

REDACTED DUE TO PAGE LIMITATIONS

Standard of Review

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Argument

I. Plaintiffs' Actions Fall Within a Clearly Established First Amendment Right to Record the Police at a Protest.

First Amendment rights are subject to "reasonable restrictions on the time, place, or manner of protected speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Eighth Circuit has stated "Government officials are entitled to qualified immunity unless their conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." *Robbins v. City of Des Moines*, 984 F.3d 673, 678 (8th Cir. 2021)(citing *Gilmore v. City of Minneapolis*, 837 F.3d 827, 832 (8th Cir. 2016)). At issue here is whether the Plaintiffs' actions in recording the officers and protestors falls within a clearly established right to record under the First Amendment.

The plethora of persuasive authority among the other circuits provides a roadmap for this Court to follow in determining a First Amendment right to record police at a protest to be clearly established law in the Fifteenth Circuit.

A. The Right to Record Has Been Clearly Established by The Circuit Courts.

To establish a clear right under the Constitution absent controlling authority, there must exist a robust consensus of cases of persuasive authority. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)(citing *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). Merriam-Webster's Dictionary defines "consensus" as "general agreement; unanimity." *Consensus*, *Merriam-Webster* (2022). First Amendment protections extend to citizens who record government officials conducting their duties. *Irizarry v. Yehia*, 38 F.4th 1282, 1288 (10th Cir. 2022). Each circuit court which has reviewed a right to record case has held that such a right is established under the First Amendment. *Id.* at 1290.

The First Circuit in *Glik* held that there exists a "clearly established right to film government officials, including law enforcement officers, in the discharge of their duties in a public space." *Glik v.* Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011).

In *Fields*, the Third Circuit established that the First Amendment right to access information allows the public to record, via photograph, film, or audio, police officers conducting police business in public areas. *Fields v. City of Phila.*, 862 F.3d 353, 355-56 (3d Cir. 2017). The specific facts of this case resulted in a grant of qualified immunity because despite the Philadelphia police department adopting a recording policy, "not every reasonable police officer" knew of its existence. *Id.* At 361. Yet, the court nevertheless held that

because the First Amendment protects actual photos, videos, and audio recordings, it must necessarily protect the act of creating the material. *Id.* at 358.

The Fifth Circuit addressed the matter in *Turner*, where the plaintiff was recording a police station when he was approached and questioned by officers who were concerned about who was recording their station. *Turner v. Driver*, 848 F.3d 678, 683 (5th Cir. 2017). While the court held that such a right had not been established at the time of the events in question, it established a First Amendment right to record the police for all future cases—noting "the circuits are not split" on the matter. *Id.* at 687—88.

In *Alvarez*, the Seventh Circuit granted injunctive relief against an Illinois eavesdropping statute, holding that audio recording of the police in public places is permitted. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

Similarly, in *Askins*, the Ninth Circuit held that First Amendment protections extend to photographing and recording matters of public interest, including "the right to record law enforcement officers engaged in the exercise of their duties in public places." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018).

Most recently, the Tenth Circuit in *Irizarry* held that an officer who had prevented a citizen from recording a roadside arrest violated a First Amendment right to record. *Irizarry v. Yehia*, 38 F.4th 1282, 1286 (10th Cir. 2022). The court here emphasized the persuasiveness of the cases above in

coming to its decision. *Id.* at 1294. Importantly, this case was decided in 2022, reflecting a continuing sentiment that the right to record exists.

When considering the definition of "consensus" above—general agreement or unanimity—the national jurisprudence regarding the right to record provides a strong example. The consensus among the circuits is evident—the right to record is clear, it is established, and it is fundamental to the information-gathering rights long held to exist under the Constitution. The idea that simply because this court has not heard the issue is evidence of a split in the circuits is flawed. Courts may only decide on cases when they are ripe. While this is a case of first impression, the persuasive authority previously published by seven circuit courts is sufficient to establish the right to record in this circuit.

B. Plaintiffs Are Entitled to Record the Police in a Public Space.

"A citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." Glik, 655 F.3d at 85. In *Glik*, the plaintiff was walking on the Boston Common when he observed three police officers arresting a man. *Id.* at 79. Hearing another bystander exclaim they thought the officers were hurting the man, the plaintiff grew concerned that excessive force was being employed. *Id.* He then stopped approximately ten feet from the officers and began to record the arrest with his cell phone. *Id.* Upon handcuffing the detainee and noticing the plaintiff's recording, an officer approached him and asked whether the phone was

capturing audio in addition to video. *Id.* at 80. When the plaintiff replied that it was, the officer placed him under arrest. *Id.*

The First Circuit reinforced its holding in Glik with its subsequent decision in Gericke. Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014). In Gericke, the court held First Amendment principles apply to recording a police officer during a traffic stop under the same "public space" principle. *Id.*

Here, Plaintiffs recorded Officer Johnson and the other officers working the protest exclusively in a public space—Libertyville's City Hall. (R. at 10). The exterior of the City Hall organization was designated specifically for protestors. While there were some limitations placed on who could stand in certain locations, this does not remove the designation of a public space. *Id.*

The "public space" principle allows citizens to hold public officials accountable when visible to their constituents. The Libertyville police set up a structure outside City Hall to ensure protestors didn't get out of hand. To prevent recording in such a public space would be to stifle the expression of the citizens.

C. Plaintiffs Are Entitled to Record The Police at a Protest

"Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." *Fields v. City of Phila.*, 862 F.3d 353, 356 (3d Cir. 2017). In *Fields*, the plaintiffs documented Philadelphia police officers carrying out their duties in two different instances—one was recording the arrest of a protestor during a

protest, and the other was photographing the arrest of a citizen during the dispersal of a house party. *Id.* Officers in each case took steps to prevent the documentation of the arrests by the plaintiffs. *Id.* The Third Circuit held that recordings of public officials remove subjective intent and are a critical part of the public's right to information about their officials. *Id.* at 359.

"Government officials are entitled to qualified immunity unless they violated a constitutional right 'so clearly established that *every reasonable official* would have understood that what he is doing violates that right.'" *Fields v. City of Phila.*, 862 F.3d 353, 360–61 (3d Cir. 2017)(citing *Zaloga v. Borough of Moosic*, 841 F.3d 170, 175 (3d Cir. 2016)(emphasis in original). Although the police officers in *Fields* were granted qualified immunity, this grant was fact-specific and not applicable in the matter at hand. While the Third Circuit's case law had not established recording police officers in their line of duty as a First Amendment right prior to the events in question in *Fields*, the plaintiffs argued that the development of police policy explicitly recognizing such a right thereby clearly established it for purposes of qualified immunity. *Fields*, 862 F.3d at 361. The court denied this argument on the grounds of testimony from department officers and other evidence that suggested the policy was not clearly and effectively communicated through the department so that every officer would understand the right to exist. *Id.* at 362. Other courts have granted qualified immunity on different grounds.

In Robbins, the plaintiff was recording illegally parked vehicles outside of a police station. *Robbins v. City of Des Moines*, 984 F.3d 673, 676 (8th Cir. 2021). A detective, who was aware of recent vehicle crimes in the area and a prior incident where two police officers had been murdered by someone who was filming the police, approached the plaintiff and questioned him about his activity. *Id.* The court held that Robbins' filming activity paired with the apprehending officers' knowledge of prior criminal incidents of similar circumstances would allow a reasonable officer to believe that the plaintiff was up to more than merely recording. *Id.* at 678.

Importantly, Officer Johnson had no indication of prior criminal activity committed by Appellants before the protest at city hall, nor were Appellants intending any malice by recording the officers and other protestors. (R. at 9). Instead, protestors who had created prior videos espousing their passion and opinion on the school board matter and posted them online were branded as "troublemakers," and the officers were told to keep a special eye on them during the protest. *Id.* The gap between "troublemakers" who post videos on the internet and a prior murder committed by a person who had been recording the police, as was the base for suspicion in *Robbins*, is more of a canyon than a crevice. Never mind the idea that citizens are allowed to speak their minds on public issues in the manner they choose, their "troublemaking" did not put the officers on reasonable notice of imminent danger like a murder or vandalism may.

Instead, this Court should adhere to the criteria set forth in *Fields* and address whether the Libertyville Police Department's policy on recording was communicated so that every reasonable official would have known of its existence. Here, Officer Johnson had clear, unambiguous knowledge of a right to record in Libertyville. (R. at 36) The officers working the protest were explicitly informed of this right by their superiors in their meeting and understood the limitations on the right to be that the recorders were not allowed to interfere with the officers' duties. *Id.* Paired with the fact that, like in *Fields*, Appellants were not interfering with Officer Johnson's official duties, there is no justification to prevent Appellants from recording the police at a protest. (R. at 11–15).

Ultimately, Appellants were not criminals whose actions triggered any threat based on prior conduct. They were merely active citizens intent on voicing their First Amendment rights—rights of which Officer Johnson and any reasonable Libertyville official knew. Applying the *Fields* framework here renders restrictions on Appellants' right to record unconstitutional.

D. Recording the Police at a Protest Falls Within the Broader Purpose of the First Amendment

The First Amendment is intended to promote an informed citizenry and to hold the government accountable through the dissemination of information. *Fields*, 862 F.3d at 359. As a matter of public policy, allowing citizens to participate in the news-gathering process—particularly in an age where

smartphone technology and social media grant an amateur press pass to anyone who possesses them—is critical to effective self-government.

In *Fields*, the court held these principles core to its holding that a right to record exists. The Third Circuit held:

> To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately. Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media. Accordingly, recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public.

Fields v. City of Phila., 862 F.3d 353, 359 (3d Cir. 2017). As a matter of policy, allowing citizens to record police in public—at protests and otherwise—enforces accountability for officers entrusted with a badge and weapon to uphold this nation's laws. That was the focus of the Appellants here—not to break any laws, not to cause violence, but to simply illustrate an inequity in policing tactics at a protest and hold the appropriate officers accountable.

II. Appellees Retaliated Against Appellants for Exercising Their Clearly Established First Amendment Right to Record.

Generally, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech.

Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019). For a retaliatory action claim to succeed under the First Amendment, the plaintiff must establish a causal connection between the government defendant's "retaliatory animus" and the plaintiff's subsequent injury. *Id.* The causal connection must be one of "but-for" causation—the adverse action against the plaintiff would not have been taken absent the retaliatory motive. *Id.* (citing *Hartman v. Moore*, 547 U.S. 250, 260 (2006)).

In addition, a "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." *Id.* at 1724. However, the no-probable-cause requirement does not apply if the plaintiff presents objective evidence to show that they were arrested when otherwise similarly situated individuals who were not engaged in the same sort of protected speech had not been. *Id.* at 1727. This is the first test to be met by a plaintiff attempting to establish a claim for retaliatory arrest. *Id.* at 1725. If this bar is met, then the causal connection test governs. *Id.*

At issue here first is whether Appellants have provided objective evidence that arrests of a similar nature have generally not been carried out in Libertyville. The second issue is whether Appellee's arrest of Appellants was caused by her retaliatory animus towards the Appellants' speech. On appeal, Appellants concede the existence of probable cause during these arrests but contend that objective evidence exists to show these arrests were atypical of those enacted by Libertyville police officers.

A. Appellants Show Objective Evidence That Arrests of The Kind They Endured Are Not Typically Enacted by Libertyville Police.

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B. Appellants' Arrest Was Directly Caused by Appellee's Retaliatory Animus Towards Appellants' Speech.

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III. Conclusion

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Applicant Details

First Name	**Daniel**
Middle Initial	**G.**
Last Name	**Stephen**
Citizenship Status	**U. S. Citizen**
Email Address	**dgstephen@wm.edu**
Address	**Address** Street **4456 Lydias Drive** City **Williamsburg** State/Territory **Virginia** Zip **23188** Country **United States**
Contact Phone Number	**7819562026**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2019**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**William and Mary Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hutter, Paul
pjhutter@wm.edu
Heymann, Laura A.
laheym@wm.edu
757-221-3812

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DANIEL STEPHEN
4456 Lydias Drive, Williamsburg, Virginia 23188 | (781) 956-2026 | dgstephen@wm.edu

June 10, 2023

The Honorable Juan R. Sánchez
Chief Judge
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street, Courtroom 14-B
Philadelphia, Pennsylvania 19106

Dear Judge Sánchez:

I am a rising third-year law student at William & Mary Law School, where I am ranked 4th (tied) in my class with a 3.8 G.P.A. and serve as a staff member for the *William & Mary Law Review*. I am writing to apply for a one-year clerkship in your chambers for the 2024-2025 term. My experience externing for a federal judge has inspired my desire to clerk, and a clerkship in your chambers would enable me to continue strengthening my research and writing skills and offer exposure to a variety of substantive areas of the law. I would welcome the opportunity to work in your chambers and to serve the Pennsylvania community.

While externing for the Honorable John A. Gibney, Jr., I developed the research, writing, and organizational skills that will allow me to thrive as a clerk. For Judge Gibney, I wrote both an internal memorandum and a draft opinion for a social security benefits appeal case. This was both my first assignment and an area of the law that was unknown to me, but I quickly learned how to familiarize myself with the subject matter, identify relevant case law, and apply precedent to the facts. I also wrote an internal memorandum that involved civil procedure, contract law, and tort law. I comprehensively analyzed the civil procedure questions for each state law claim in a succinct manner, and logically organized the memorandum to avoid redundancy even as many of the issues had recurring arguments.

Further, my current experience as a summer associate at Squire Patton Boggs has sharpened my research and writing skills. In this role, I have intentionally taken on assignments for different legal areas, ranging from federal investigations to litigation. In these assignments, I have both drafted formal memoranda and informal work product that can be presented orally.

I have enclosed for your review my resume, writing sample, law school transcript, and letters of recommendation from Professor Laura Heymann and Professor Paul Hutter. I would be grateful for the opportunity to interview and further discuss my qualifications. Thank you for your consideration.

Respectfully,
Daniel Stephen

DANIEL STEPHEN

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(781) 956-2026 | dgstephen@wm.edu

EDUCATION

William & Mary Law School, Williamsburg, Virginia
J.D. expected, May 2024
G.P.A.: 3.8, Class Rank: 4/175 (tied)

Honors: ***William & Mary Law Review***
CALI Award for highest grade in Legal Research and Writing I
Publications: Note, *Press Play to Presume: The Policy Benefits Behind the Trademark Modernization Act's Resurrection of the Irreparable Harm Presumption in False Advertising Cases*, 65 WM. & MARY L. REV. (forthcoming 2024).
Activities: Virginia Bar Association Law School Council, Outreach Chair
Jewish Law Students Association

The George Washington University, Washington, DC
B.A., *cum laude*, Psychology major, Criminal Justice minor, May 2019
G.P.A.: 3.53
Honors: Dean's List (Spring 2018, Spring 2019)

EXPERIENCE

Squire Patton Boggs LLP, Washington, DC
Summer Associate — May 2023 to July 2023
Researched a variety of substantive legal areas including state contract law, FCPA enforcement actions, and legal ethics case law. Performed discovery document review in a state law litigation matter involving a cybersecurity attack and a breach of contract. Wrote an internal memorandum analyzing the attorney-client privilege in litigation involving third-party judgment risk insurers.

The Honorable John A. Gibney Jr.*, *U.S. District Judge
United States District Court for the Eastern District of Virginia, Richmond, Virginia
Judicial Extern — January 2023 to April 2023
Researched and wrote draft opinions resolving a compassionate release petition and a social security benefits appeal. Researched and drafted internal memoranda including a motion to remand for lack of diversity jurisdiction, a tortious interference claim, a breach of contract claim, and a motion to sever. Analyzed and drafted internal memoranda for use during various sentencing hearings and pretrial conferences.

William & Mary Veterans Benefits Clinic, Williamsburg, Virginia
Summer Intern — June 2022 to August 2022
Managed over 15 veterans' claims cases under the supervision of an attorney. Worked on both initial disability compensation claims and appeals to the Department of Veterans Affairs (VA). Undertook legal research and wrote memoranda and letters to support appeals to the VA. Analyzed thousands of medical and military records. Directly contacted existing clients and conducted intake interviews for new clients.

WILLIAM & MARY
LAW SCHOOL
OFFICE OF CAREER SERVICES

Unofficial Grade Sheet

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.

- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.

- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Students with a rounded cumulative GPA of 3.5 and above have typically received a percentage rank calculation that falls in the top 1/4 of a class.

- Please also note that there may be some variation in how students provide their grade information, as instead of this grade sheet, some students may provide a copy their unofficial grade information as downloaded directly from the University's online system.

Date Prepared: May 28, 2023

Daniel Stephen
781-956-2026
dgstephen@wm.edu

Date of Expected Graduation: 05/2024

Cumulative GPA: 3.78

Semester [Fall 2021]

Course Title	Credits	Grade
Criminal Law	4	A-
Civil Procedure	4	A-
Torts	4	A-
Legal Research & Writing I	2	A
Lawyering Skills I	1	H (Honors Pass)

Term GPA: 3.74
Cumulative GPA: 3.74

Semester [Spring 2022]

Course Title	Credits	Grade
Property	4	A-
Constitutional Law	4	A
Contracts	4	A-
Legal Research & Writing II	2	A
Lawyering Skills II	2	H (Honors Pass)

Term GPA: 3.82
Cumulative GPA: 3.78

Semester [Fall 2022]

Course Title	Credits	Grade
William & Mary Law Review	1	P (Pass)
Professional Responsibility	2	A
First Amendment – Free Speech & Press	3	A
Copyright Law	3	A
Business Associations	4	A-

Term GPA: 3.90
Cumulative GPA: 3.82

Semester [Spring 2023]

Course Title	Credits	Grade
William & Mary Law Review	1	P (Pass)
Judicial Externship	4	P (Pass)
Advanced Writing & Practice – Transactional Writing	2	B+
Legislative/Statutory Interpretation	3	A
The Military Commissions Seminar	2	A
Securities Litigation	3	B+

Term GPA: 3.65
Cumulative GPA: 3.78

Courses in Progress
Semester [Fall 2023]

Course Title	Credits
Advanced Writing & Practice – Civil Writing	2
Evidence	3
Criminal Procedure Survey	3
Intellectual Property	3
Academic Freedom, Free Speech & University Speech	2
SCOTUS & Police Interrogations	1

* This grade sheet has been self-prepared by the above-named student. The student will bring a copy of an "Unofficial Transcript" at the time of an interview or forward one at the request of an employer.

Paul J. Hutter
Adjunct Professor of Law

William & Mary Law School
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Williamsburg, VA 23185

Phone: (703) 328-3677
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June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend my student, Daniel Stephen, for a judicial clerkship. He is smart, writes well, communicates effectively, researches creatively and possesses the integrity and temperament of a superior law clerk. He will be an asset to any Judge's chambers.

By way of introduction, I currently serve as the General Counsel for the Uniformed Services University of the Health Sciences, my third experience leading law offices in the Department of Defense and Veterans Affairs. I also have provided consulting services for Booz Allen Hamilton and teach classes at the William & Mary Law School concerning the Military Commissions in Guantanamo, Cuba and Law Firm Leadership. I met Daniel this semester as he took the Military Commissions course.

Daniel is an excellent student, distinguishing himself through his writing and during our extensive in-class discussions. He demonstrated clear, logical thinking; he was always well prepared for class – often going beyond the required reading to gain additional perspective; and his arguments always were well presented. He captured the black letter law and the nuances associated with the many opinions issued by the U.S. Supreme Court and other federal courts concerning the Commissions. Daniel's final paper in the course demonstrated his creativity and provided a strong, logically developed and well-written argument for prosecuting terrorists in Article III courts instead of military commissions.

During our discussions in and out of class, Daniel demonstrated his honest approach to life and the law. He drew well from his summer externship and internship experiences and his varied leadership roles at William & Mary Law School to achieve a mature, focused outlook on the law and life in general.

I would hire Daniel to work in any of the offices I have been privileged to lead and urge you to do the same. He will work hard, learn quickly and exceed your expectations.

Sincerely,

/s/

Paul J. Hutter
Adjunct Professor of Law

Laura A. Heymann
Chancellor Professor of Law and Kelly Professor of Excellence in Teaching

William & Mary Law School
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June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Daniel Stephen

Dear Judge Sanchez:

By way of introduction, I am on the faculty at William & Mary Law School in Williamsburg, Virginia. Daniel (Dan) Stephen, a member of the class of 2024 at the Law School, has applied for a judicial clerkship with your chambers. I'm writing to provide a strong recommendation of Mr. Stephen, and I hope that you will offer him an interview and, ultimately, a clerkship.

Mr. Stephen was a student in my Copyright Law during the Fall 2022 semester. He was a thoughtful and active participant in the classes, demonstrating an intellectual interest in the topics we were discussing and a willingness to engage with my questions. It was clear that he had prepared thoroughly for each class session and that he was willing to explore aspects of the reading he had not previously considered, even if that required him to think on his feet. He has mentioned that the class was particularly useful to him because it helped him to become skilled in understanding legal issues in a more analytical way by breaking things down to explore particular aspects and then putting those aspects together to understand the bigger picture.

In addition to a final exam, the students were required to complete ungraded practice assignments, for which I provided individual feedback. The assignments consisted of activities based on real-life work for clients (e.g., responding to a cease-and-desist letter, providing an initial opinion in response to a client's request). I have reviewed once again Mr. Stephen's written assignments and his final exam. His written assignments were thoughtful and sophisticated, analyzing the problems presented in a practical manner, geared toward determining the likely result for the client. His final exam was one of the top exams in the class. It was extremely well organized and well written, covered a wide range of issues, and provided a thoughtful analysis of facts that were open to multiple interpretations. I would assess his work product as that of a first-year or second-year associate rather than a law student.

I have also had the opportunity to review Mr. Stephen's writing sample, which is the first draft of an opinion determining whether to accept, modify, or reject the report and recommendation of a Magistrate Judge. While you are obviously in the best position to assess the quality of his work product, I can offer my own opinion, which is that the draft is very well done; it proceeds in a logical manner that clearly summarizes the relevant facts and law and explains the conclusion reached. Although I have not reviewed the underlying record in the case at hand, to my mind, this draft could be adopted wholesale, or nearly so, by the court.

Finally, I have had the opportunity to read a draft of Mr. Stephen's student note, which analyzes the policy implications of the Trademark Modernization Act of 2020's restoration of irreparable harm in the analysis of requests for injunctions under the Lanham Act. I think this is a fine piece of student work. Mr. Stephen puts forward an appropriately narrow thesis that he defends well; the piece is not overly ambitious but demonstrates solid research and a good grasp of the concepts it discusses.

Mr. Stephen's performance at the Law School to date has put him among our highest-achieving students academically, with top grades in a wide range of classes, which suggests an ability to learn new subject matter quickly and effectively. (This was particularly apparent in the Copyright Law class, which requires students to get up to speed on a variety of new technologies in order to understand the development of the case law.) His selection for the Law Review and his award for his work in his first-semester Legal Research & Writing class are further evidence of the skills he will bring to the clerkship.

I hope that you will give Mr. Stephen's application thoughtful attention. In communicating with him, I know that he is very interested in improving his already considerable research and writing skills and in contributing to the work of the chambers.

If you have any questions, or if I can be of further assistance, please do not hesitate to get in touch.

Very truly yours,

/s/

Laura A. Heymann

Chancellor Professor of Law

Laura A. Heymann - laheym@wm.edu - 757-221-3812

DANIEL STEPHEN
4456 Lydias Drive, Williamsburg, Virginia 23188 | (781) 956-2026 | dgstephen@wm.edu

WRITING SAMPLE

I prepared this draft opinion during my spring externship with the Honorable John A. Gibney, Jr. of the U.S. District Court, Eastern District of Virginia. I have obtained Judge Gibney's consent to use this document as a writing sample. All sensitive and/or confidential information has been redacted.

This was the first draft of an opinion determining whether to accept, modify, or reject a Magistrate Judge's report and recommendation. This draft opinion is substantially my own work and has not been edited by others.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

[Redacted],
Plaintiff,

v. Civil Action No. **x:xx-cv-xxx**

KILOLO KIJAKAZI,
Acting Commissioner of Social Security.

OPINION

The plaintiff challenges the Social Security Administration ("SSA") Commissioner's final decision denying her claim for disability insurance benefits and supplemental security income. On October 17, 2019, an Administrative Law Judge ("ALJ") found the plaintiff not disabled and subsequently denied her benefits. (R. at 21-39.) The plaintiff moved for summary judgment in this Court, while the defendant moved to remand. On June 30, 2022, the Magistrate Judge issued a Report and Recommendation ("R&R") on the parties' motions. (ECF No. 30.) The R&R recommended that the Court (1) grant in part the plaintiff's motion for summary judgment to the extent it requests remand but deny the plaintiff's motion to the extent it requests an immediate award of benefits; (2) grant the defendant's motion to remand; (3) reverse the final decision of the Commissioner; and (4) remand the case for further proceedings.

The parties agree that the Court should remand this case because the ALJ erred. The plaintiff, however, objects to the R&R on grounds that the ALJ's determination is not supported by substantial evidence in the record. Specifically, she argues that the Magistrate Judge incorrectly concluded that the vocational expert's ("VE") testimony created an ambiguity that requires further proceedings. She argues that the testimony instead demonstrates that her limitation represents an accommodation in the workplace. She contends that, because of this accommodation, clear

evidence of her disability exists, and the Court should remand and award her immediate benefits instead of remanding the case for further proceedings. (*Id.* at 11.)

The Court has reviewed the record and agrees that the VE's ambiguous testimony requires remand for further proceedings. Accordingly, the Court will adopt the R&R in whole and overrule the plaintiff's objections.

I. BACKGROUND

The plaintiff filed a claim with the SSA for disability insurance benefits and supplemental security income in 2018. (R. at 242, 251.) The ALJ conducted a hearing on August 22, 2019, where counsel represented the plaintiff and a VE testified on her behalf. (R. at 49-82, 174.) The ALJ concluded that the plaintiff's residual functional capacity ("RFC") "requires no special supervision after the task has been learned, but for one (1) to two (2) business weeks following assignment of a new task[], she may require two (2) additional five (5) minute visits per week to ensure understanding of a task as well as proper and timely completion." (R. at 29–30.)

During the proceedings, the VE testified regarding whether the plaintiff could achieve work in the national economy given her RFC, age, education, and work experience. (R. at 83-92.) The ALJ then asked a series of hypotheticals to the VE. (R. at 83-92.) The ALJ first posed whether a person could acquire work in the national economy if they required "for one to two business weeks[] following assignment of a new task,…two additional five-minute [supervisor] visits[] per week [for one to two business weeks after they were assigned a new task] to ensure understanding of the task, as well as proper and timely completion." (R. at 84–86.) This hypothetical reflected the plaintiff's actual RFC. The VE answered that at least three types of suitable work exist in the national economy, with 195,000 positions available for the three jobs. (R. at 87.) When asked

whether more frequent supervision—one to two times per day instead of per week—would preclude all work, the VE testified that it would. (R. at 88.)

The plaintiff's counsel then questioned the VE about the ALJ's first hypothetical requiring the additional meetings one to times per week, asking whether that level of supervision "is. . . something that's normal in a work environment." (R. at 88.) The VE described the requirements as a "borderline accommodation," and that "[i]t's not necessarily unusual that employers…need to follow up on their instructions and the type of work that's being performed." (*Id.*) When the attorney asked whether "[it] could affect [the] number [of jobs in the national economy]" if the frequency of the follow-up "was deemed to be accommodated by certain companies," the VE responded: "Absolutely. I think that's something that has to be determined by the individual employer. If it's accommodated work, in my mind, it's not work that's routinely performed in the national economy. It's something other than that." (R. at 89.) When the ALJ later asked "which side of [borderline]" the RFC falls on, the VE answered, "with the hypothetical individual that was posed to me, I believe it would be accommodated work." (R. at 91.)

At the end of the hearing, the ALJ asked the plaintiff's counsel, "which hypo it was that led to the borderline accommodating, and I don't remember if it was 1 or 2", to which counsel responded: "[t]hat – he said in [hypo] 1, I believe." (R. at 91-92.) The VE then said, "[r]ight" and the ALJ replied, "[t]hat was the accommodated portion. Okay. I just wanted to make sure I had this right." (R. at 92.)

In her decision denying benefits, the ALJ cited the VE's testimony that the plaintiff's RFC still enabled her to obtain work in the national economy, concluding that "the claimant is capable of making a successful adjustment to other work that exists in significant numbers in the national economy." (R. at 33.) The ALJ's decision did not mention the VE's testimony claiming that the

hypothetical reflecting the plaintiff's RFC is "borderline accommodated work" and would fall on the "side" of "accommodated." (R. & R. 11.) Consistent with the VE's other testimony, that would make the plaintiff's RFC an accommodation and would preclude work in the national economy.

On July 12, 2021, the plaintiff filed a complaint in this Court to review the Commissioner's decision pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). Both parties agree that the Court should reverse the ALJ's decision. Accordingly, on June 30, 2022, the Magistrate Judge issued an R&R recommending the Court reverse the ALJ's decision and remand the case for further proceedings. The plaintiff now objects to the R&R and argues that the Court should remand this case to the SSA with direction to award immediate benefits.

II. DISCUSSION

1. Legal Standard

This Court reviews *de novo* any part of the R&R to which a party has properly objected. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). The Court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommended disposition. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3).

The SSA's regulations set forth a five-step process that the agency uses to determine whether disability exists. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *see Mascio v. Colvin*, 780 F.3d 632, 634-35 (4th Cir. 2018) (describing the ALJ's five-step sequential evaluation). The claimant qualifies as disabled when her RFC bars her from performing other work "that exists in significant numbers in the national economy." *Woods v. Berryhill*, 888 F.3d 686, 689 (4th Cir. 2018) (citing §§ 404.1560(c); 404.1520(c)).

A reviewing court can only reverse an ALJ's denial of benefits if either "the ALJ's decision [is not] supported by substantial evidence" or the ALJ reaches her factual finding "by means of an improper standard or misapplication of the law." *See Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987). In addition, "[w]here there are gaps in the administrative record . . . the proper course is a remand to the Commissioner for further proceedings." *Brascher v. Astrue*, No. 3:10cv256, 2011 WL 1637045, at *3 (E.D.V.A. Apr. 29, 2011) (quoting *Ianni v. Barnhart*, 403 F.Supp.2d 239, 257 (W.D.N.Y. 2005)). Further, "when an ALJ fails to provide a 'logical explanation' connecting its RFC analysis to the record evidence, the 'proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Carr v. Kijakazi*, No. 20-2226, 2022 WL 301540, at *4 (4th Cir. Feb. 1, 2022) (first quoting *Thomas v. Berryhill*, 916 F.3d 307, 311–12 (2019); and then quoting *Radford v. Colvin*, 734 F.3d 288, 295 (2013)). "[I]t is only in those cases – where it is clear that there is no account on which substantial evidence would support a denial of coverage – that a court may exercise its discretion to direct the award of benefits as a remedy for a failure to explain." *Id.* Ultimately, the ALJ, and not the reviewing court, must resolve conflicts in the record, including inconsistent testimony. *See Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990).

2. Analysis

The plaintiff argues that the record unequivocally shows that she qualifies as disabled. Specifically, she argues that the VE's testimony establishes that the plaintiff's RFC contains an accommodation, which would preclude work in the national economy. The crux of the plaintiff's argument relies on the VE's response when the ALJ pressed the VE about "what side" of "borderline [accommodated]" the first hypothetical matching the plaintiff's RFC "falls on," and the VE testified, "I believe it would be accommodated." (*Id.* at 4; R. at 91.) The plaintiff further

contends that the ALJ "received the clarification she sought before ending the hearing" when she asked, "which hypo…led to the borderline accommodating" and the plaintiff's counsel replied, "he [the VE] said it in [hypo] 1, I believe." (ECF No. 31, at 5.). The VE then said "[r]ight" and the ALJ replied, "[t]hat was the accommodated portion." (*Id.*) The plaintiff argues this testimony reveals the ALJ understood the RFC to include an accommodation, meaning no substantial evidence exists to support a denial of disability and benefits. She contends that the Magistrate Judge, therefore, should have remanded with direction to award benefits instead of for further proceedings.

Recently, the Fourth Circuit addressed the question of when a district court should direct an award of benefits rather than remand for further proceedings. *See Carr v. Kijakazi*, No. 20-2226, 2022 WL 301540 (4th Cir. Feb. 1, 2022). In *Carr*, two experts gave conflicting testimony about the frequency of the plaintiff's panic attacks and whether this limitation required special accommodations that would prevent him from working in the national economy. *Id.* at *5. The Fourth Circuit found that because of this ambiguity and inconsistency, "the proper remedy is to remand for the explanation that will make possible a 'meaningful review' of the ALJ's determination." *Id.* (citing *Radford v. Colvin*, 734 F.3d 288, 296 (4th Cir. 2013)). Further, "when an ALJ fails to define a limit included in an RFC…it will be 'difficult, if not impossible,' to determine whether that restriction is supported by substantial evidence." *Id.* at *4; *see also Thomas*, 916 F.3d at 312.

The Magistrate Judge correctly concluded that the VE gave conflicting and ambiguous testimony about the accommodation. Initially, the VE testified that the hypothetical matching the plaintiff's actual RFC would permit her to obtain work in the national economy, with 195,000 positions available. (R. at 86-87.) The VE then testified that more frequent visits by a supervisor

compared to the plaintiff's RFC would escalate the plaintiff's RFC into "accommodated work." (R. at 87-89.) The VE further testified that the hypothetical reflecting the plaintiff's RFC was "borderline accommodated work" and that if he had to choose, he would consider it on the "side" of accommodated work rather than non-accommodated work. (R. at 89-92.) The ALJ even asked the VE to clarify whether the limitation would require accommodated work, and the VE stated that accommodated work "i[s] not work that's routinely performed in the national economy." (R. at 89.)

The plaintiff argues that the VE's testimony, and the ALJ's later clarifying question, resolves any ambiguity that may have initially existed. But the VE's testimony did not resolve this ambiguity, explain his reasoning for the discrepancy, or indicate that he misspoke initially and meant to clarify that the plaintiff's RFC requires an accommodation. Instead, he simply said "[r]ight" when the plaintiff's counsel and the ALJ inquired about whether the first hypothetical represented an accommodation. (R. at 92.) This testimony indicates that the RFC's limitation could represent non-accommodated, borderline accommodated, or even accommodated work. The record, therefore, "mak[es] it impossible for a court to definitively conclude that there was not substantial evidence to support a decision denying coverage." *See Carr*, 2022 WL 301540, at *3 (citation and quotations omitted).

The plaintiff also argues that the hearing resolved any ambiguity at its conclusion when the ALJ "clarified" that the first hypothetical reflecting the plaintiff's actual RFC "was the accommodated portion." (ECF No. 31, at 5.) But this produces an inconsistency with the ALJ's ultimate denial of benefits. In her decision, the ALJ held that "based on the testimony of the [VE]…considering the claimant's age, education, work experience, and residual functional capacity, the claimant is capable of making a successful adjustment to other work that exists in

significant numbers in the national economy." (R. at 33.) The ALJ relied on the VE's testimony discussing the plaintiff's ample job opportunities even with her RFC. (R. at 33.) The ALJ, therefore, either believed that the plaintiff's RFC does not constitute an accommodation, or it does, but no disability exists because she could work in the national economy. Regardless of these two outcomes, enough evidence certainly exists showing that the ALJ failed to define or understand a limit included in the RFC and that the proper remedy is to remand for meaningful review. *See Carr*, 2022 WL 301540, at *3-5 (citation and quotations omitted).

In sum, this is not "the unusual case in which it can be determined, even in the absence of an explanation, that there is no account on which substantial evidence could support a denial of benefits." *Id.* at *3 (citation omitted); *see also Breeden v. Weinberger*, 493 F.2d 1002, 1012 (4th Cir. 1974). Here, the VE's testimony that the hypothetical matching the plaintiff's RFC limitation includes possibly both accommodated and non-accommodated work bears directly on whether the ALJ could consider her disabled. Like *Carr*, this "is not the rare case in which it is clear that an ALJ decision denying benefits, properly explained, could not be supported by substantial evidence in the record." *Carr*, 2022 WL 301540, at *3. Accordingly, substantial evidence exists supporting a denial of benefits and does not warrant a remand for direction to award benefits.

III. CONCLUSION

The Court will overrule the plaintiff's objections to the R&R, grant the plaintiff's motion for summary judgment in part to the extent that it requests remand and deny in part to the extent it requests an immediate award of benefits, grant the defendant's motion to remand, reverse the final decision of the Commissioner, and remand the case for further proceedings. Accordingly, the Court will adopt the Magistrate Judge's R&R.

Applicant Details

First Name	**Martha**
Last Name	**Strautman**
Citizenship Status	**U. S. Citizen**
Email Address	**mstraut95@gmail.com**
Address	**Address** Street **70 East 10th Street, Apt 10J** City **New York** State/Territory **New York** Zip **10003** Country **United States**
Contact Phone Number	**9175667981**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Legislation and Public Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gelbach, Jonah
gelbach@berkeley.edu
Schulhofer, Stephen
stephen.schulhofer@nyu.edu
212-998-6260
Bauer, Robert
rb172@nyu.edu
202.434.1602

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Martha Strautman
70 East 10th St Apt 10J
New York NY 10003

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising third-year student at New York University School of Law and an Articles Editor for the Journal of Legislation and Public Policy. I am writing to express my interest in a clerkship in your chambers for the 2024-2025 term.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. In the writing sample, a paper from a class on comparative reproductive rights, I compare different methods of abortion legalization in South Korea and Argentina. Also enclosed are letters of recommendation from two NYU School of Law professors, Stephen Schulhofer and Bob Bauer. Last summer, I worked as a research assistant for Professor Schulhofer examining the issue of sexual assault on college campuses and analyzing relevant federal legislation. I am also enclosing a letter of recommendation from UC Berkeley School of Law Professor Jonah Gelbach, who was a visiting professor at NYU during my first year.

Please let me know if there is any other information that would be helpful to you. Thank you for your consideration.

Respectfully,

Martha Strautman

MARTHA STRAUTMAN
70 East 10th St., Apt 10J; New York, NY 10003
(917) 566-7981; mgs9043@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Honors: Dean's Scholarship
Activities: Journal of Legislation and Public Policy, Articles Editor
Brennan Center Public Policy Advocacy Clinic (Fall 2022)
Law Women, Co-President (2022-2023)

GEORGETOWN UNIVERSITY, Washington, DC
B.A. in American Studies, *cum laude*, May 2018
GPA: 3.82
Senior Thesis: *Breaking the Forgotten Glass Ceiling: How Geraldine Ferraro Became the First Woman Vice Presidential Candidate*
Activities: Georgetown Intramural Sports, Student Director; Georgetown Office of Residential Living, Student Assistant; Georgetown University Women in Leadership, Blog Writer and Member
Study Abroad: La Universidad Complutense de Madrid, Madrid, Spain, Spring 2017

EXPERIENCE

SIDLEY AUSTIN, LLP, New York, NY
Summer Associate, Summer 2023
Perform research on New York's General Obligations Law and the potential impact on corporate lending. Engage in document preparation for purchases of assets in a complex bankruptcy case. Assist with finalizing the credit agreement and guaranty and security agreement for a corporate borrower.

EQUAL RIGHTS ADVOCATES, San Francisco, CA
Law Clerk, Summer 2022
Engaged in legal research and writing on gender discrimination issues, including analyzing current litigation strategies and evaluating proposed rulemaking from the Department of Education. Attended legislative hearings.

PROFESSOR STEPHEN SCHULHOFER, NYU SCHOOL OF LAW, New York, NY
Research Assistant, Summer 2022
Conducted research relating to sexual assault on college campuses, including on relevant federal legislation and enforcement and state criminal statutes.

ANNE LEWIS STRATEGIES, LLC, Washington, DC
Senior Digital Strategist, February 2021 – April 2021; ***Digital Strategist***, April 2020 – February 2021; ***Digital Advertising Associate***, March 2019 – April 2020
Directed advertising strategy for four non-profit and political clients. Managed six advertising budgets of up to $20 million and structured campaigns on digital platforms. Conducted operational client management.

ARIZONA DEMOCRATIC PARTY/ KIRKPATRICK FOR CONGRESS, Tucson, AZ
Field Organizer, June – November 2018
Recruited, trained, and managed 230+ campaign volunteers and interns. Coordinated 1,100+ volunteer shifts. Planned and managed 10+ local events with candidates up and down the Democratic ballot.

ADDITIONAL INFORMATION
Interests include reading, especially books with female protagonists, and playing competitive sports, including basketball, soccer, and flag football. Member of NYU Law's Dean's Cup basketball team.

Name: **Martha G Strautman**
Print Date: **06/01/2023**
Student ID: **N10863096**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Brandon Jeromy Johnson			
Torts	LAW-LW 11275	4.0	B
Instructor: Cynthia L Estlund			
Procedure	LAW-LW 11650	5.0	A
Instructor: Jonah B Gelbach			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Martin Guggenheim			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Brandon Jeromy Johnson			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Roderick M Hills			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Sheldon Andrew Evans			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Martin Guggenheim			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Brennan Center Public Policy Advocacy Clinic	LAW-LW 10328	3.0	A-
Instructor: Hernandez Stroud			
Brennan Center Public Policy Advocacy Clinic Seminar	LAW-LW 10353	2.0	A-
Instructor: Hernandez Stroud			
Corporations	LAW-LW 10644	5.0	A-
Instructor: Marcel Kahan			
Reproductive Rights and Justice: A Comparative Perspective Seminar	LAW-LW 12768	2.0	A-
Instructor: Chao-ju Chen			
Reproductive Rights and Justice: A Comparative Perspective Seminar:Writing Credit	LAW-LW 12840	1.0	A-
Instructor: Chao-ju Chen			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 11783	4.0	B
Instructor: David Jerome Reiss			
Judicial Decision Making	LAW-LW 12250	4.0	B+
Instructor: Barry E Friedman			
Sex Discrimination Law	LAW-LW 12271	3.0	A
Instructor: Elizabeth M. Schneider			
After the 2022 Election: the Paths and Challenges of Political Reform Seminar	LAW-LW 12398	2.0	A-
Instructor: Robert Bauer			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	56.0	56.0

Staff Editor - Journal of Legislation & Public Policy 2022-2023

End of School of Law Record

Berkeley Law

Jonah B. Gelbach
Herman F. Selvin Professor of Law
University of California, Berkeley
School of Law
790 Simon Hall
Berkeley, CA 94720
(202) 427-6093 (cell)
gelbach@berkeley.edu

May 30, 2023

RE: Martha Strautman, NYU Law '24

Your Honor:

I write to recommend Martha Strautman for a judicial clerkship in your chambers. Martha is especially interested in clerking at the state court level. She has a particular interest in New York state clerkships, but she is open to others as well. She is interested in both trial- and appellate-level clerkships.

I know Martha because she was my student in my 1L civil procedure course at NYU Law, where I was a Visiting Professor, in the Fall 2021 semester. Martha did very well in my course—not only earning a grade of A, but scoring 9th out of 98 students in what was probably the strongest group of students I've had in a black-letter course in 10 years of teaching law at NYU, Penn, and Berkeley. I also had the chance to get to know Martha a bit outside of class during a lunch with her and two of her classmates. She is a thoughtful, interesting, articulate and pleasant person who will be a fine addition to your chambers.

Martha's activities both before and during law school demonstrate her strong commitment to public interest, especially with respect to gender equality issues. She has served as Co-President of NYU's Law Women group. In the summer of 2022, following her 1L year, Martha worked as a law clerk for Equal Rights Advocates, a public interest organization that works on gender justice issues in both schools and workplaces; her work related to the group's impact litigation as well as Department of Education rulemaking. That same summer, she worked as a research assistant for Professor Stephen Schulhofer, researching and writing memos analyzing federal litigation involving sexual assault on college campuses. In a course through the Brennan Center Public Policy Advocacy Clinic, Martha worked on state-level democracy and government reform issues in New York. Before law school, she worked for a political strategy firm and as a field organizer for a congressional campaign.

Martha will be an associate at Sidley Austin in the Summer of 2023, and she hopes to work as a litigator following law school, at which I expect her to excel given her strong performance in

civil procedure. Her longer-term plans center around public interest work related to democracy and gender justice issues.

In sum, I am sure Martha will do an excellent job as a judicial clerk, and I am glad to recommend that you hire her.

Yours,

Jonah B. Gelbach

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 322B
New York, NY 10012

Professor Stephen J. Schulhofer
Robert B. McKay Professor of Law Emeritus

212-998-6260 (tel)
212-995-4030 (fax)
stephen.schulhofer@nyu.edu

June 12, 2023

Re: Martha G. Strautman – Clerkship Application

Dear Judge:

Martha Strautman, a rising third-year student at NYU Law School, is applying for a judicial clerkship for the year 2024-25 or thereafter. I am very pleased to give her my enthusiastic recommendation.

Although I have not had Martha as a student in class, I asked her to work for me as a research assistant, on the basis of her academic record and impressive interview. In addition to her strong grades, she serves currently as an officer of NYU's *Journal of Legislation and Public Policy*, a journal equivalent to the *NYU Law Review*, and she has been active in several law-related extracurriculars, including as Co-President of NYU Law Women, and in student efforts related to defense of tenants in housing matters.

My own direct contact with Martha was when she worked for me as a research assistant last summer after her 1L year (May-August 2022). She was able to help with research for me only part-time, 10 hours a week, because she was also serving as a full-time legal intern at a nonprofit focused in issues relating to gender discrimination. While there she was immersed not only in legal research but also in client contact, as well as strategies related to litigation and legislative reform.

In Martha's part-time research for me, I had a chance to work closely with her, and her work consistently met very high standards. Despite her demanding day job, the work she produced for me was always thorough, well-written, and 100% responsive to my priorities. Her assignments were in two distinct areas, calling for different research skills.

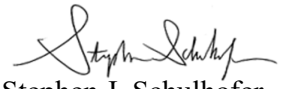
One of Martha's assignments was an outgrowth of my work as Reporter for the American Law Institute project to revise the sexual assault provisions of the Model Penal Code. In that regard, I needed a meticulous review of the past five years of amendments and revisions to all relevant details of the state statutes relating to sexual assault. Martha

completed that potentially tedious work with great care and precision, and explained the results in a readily comprehensible way – no easy achievement.

Her second assignment was to assess the then-current situation with regard to allegations of sexual assault on college campuses. The subject had been an intense focus of activism and media attention in the period 2016-17, but the most recent developments had received much less attention. Martha effectively provided a concise synthesis and assessment of a considerable volume of material on such issues as the incidence of sexual misconduct on campuses, recent protest movements on behalf of victims and alleged perpetrators, regulatory responses from the Department of Education during the Trump and Biden Administrations, litigation, and the most important advocacy across the principal issues. In this assignment Martha showed excellent judgment in culling important material from the vast bulk of new developments. And her work product was thoughtful, thorough, and exceptionally well-written.

On a personal level, Martha is articulate, easy to get along with, and quick to understand complex assignments. I have no doubt that she will be a valued asset in any judicial chambers. I recommend her very highly.

Sincerely,



Stephen J. Schulhofer
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School of Law

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New York, New York 10012-1099
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Bob Bauer
Distinguished Scholar in Residence and Senior Lecturer
Co-Director of the Legislative and Regulatory Process Clinic

«DateForLetter»

RE: «Student»

Your Honor:

I am writing to recommend Martha Strautman for a position as a clerk in your chambers.

I am familiar with Martha's strength as a law student from my experience with her as a student this last semester in my class on political reform. This is one of the offerings of the NYU law curriculum on law and democracy. It surveys a wide range of issues in political reform: redistricting, campaign finance, voting rights, lobbying, alternative voting systems, and others.

Martha is one of the students who made the class work as I hoped it would. Like a number of other students in the class, she came to the discussions with a strong commitment to law as a positive force for social change. At the same time, she recognizes the importance of grappling seriously with hard issues that political reforms typically pose. She was thoughtful, well prepared for class, open to the views of others, and articulate in the presentation of her own.

All of the students participating in seminar were required to write a paper at the conclusion of the semester on an approved topic. Martha took up a topic we had covered in class, ranked choice voting, and examined its impact—both as claimed and as so far empirically studied in jurisdictions where it has been adopted--on the election of women and candidates of color.

Martha produced a fine paper, distinctive for her careful examination of the literature on this topic. In reviewing the paper in preparation for writing this letter, I noted that I had marked at the top of the paper "care", that is to say, that she displayed commendable care in her assessment of the effects of this reform. She rightly concluded that the data was mixed. She also identified the issue that some of the studies have been produced by organizations strongly supporting the reform – – advocates for change whose research tends to line up with the conclusions that they favor. Yet she also fairly pointed to the evidence reform advocates could claim for their position.

In other words, Martha displayed strong critical thinking on a topic that she cares deeply about. It is that combination — engagement with the subject matter but no loss of analytical distance — which I much appreciated in Martha as a student.

For these reasons, I have no doubt Martha would be an excellent judicial clerk.

I would be very glad to provide any additional information or answer any questions that you may have.

Very truly yours,

Bob Bauer

The below piece of writing is an excerpt from my paper Abortion Legalization in South Korea and Argentina: Litigation vs. Legislation and the Reproductive Justice Movement. In the paper, I analyze two methods of abortion legalization – a judicial decision and legislation – and assess which one is better suited to realizing the values of the reproductive justice movement. The below excerpt is from the section on South Korea.

2. Abortion Ban and Reality of Access Until 2019

i. Abortion ban and practical access

In 1953, South Korea banned abortion through the criminal code.[1] The relevant articles prohibited women from procuring an abortion (and anyone who was complicit) and doctors or other medical professionals from performing the procedure.[2] The punishments ranged from fines to imprisonment for up to ten years if the person died from the procedure.[3] However, from the 1960s to the 1980s, abortion, contraception, and sterilization were widely encouraged as part of an effort to control the nation's birth rate.[4] In some cases, these services were even used coercively among groups like people with disabilities, single mothers, and low-income mothers.[5] This policy was driven largely by the government's desire to qualify for international aid.[6] Still, the country nominally prohibited abortion and most people obtained the procedure illegally, which often meant the procedure was less safe.

In 1973, the National Assembly enacted the Mother and the Child Act, which allowed for some exceptions to the ban – for rape, incest, severe genetic disorders, or severe health risk to pregnant person.[7] However, the legislation did not actually provide as much abortion access through those exceptions as the language of the statute may make it seem.[8] First of all, the act only applied to abortions before the 24th week of pregnancy.[9] Secondly, the test for determining

[1] The Associated Press in Seoul, *South Korea Upholds Abortion Ban*, THE GUARDIAN (Aug. 23, 2012), https://www.theguardian.com/world/2012/aug/23/south-korea-abortion-ban-upheld.
[2] Woong Kyu Sung, *Abortion in South Korea: The Law and the Reality*, 26 INT'L J. L., POL'Y AND FAM. 278, 280 (2012).
[3] Hyosin Kim & Hyun-A Bar, *A Critical Assessment of Abortion Law and Its Implementation in South Korea*, 24 ASIAN J. WOMEN'S STUD. 71, 74 (2018).
[4] Sunhye Kim, Na Young & Yurim Lee, *The Role of Reproductive Justice Movements in Challenging South Korea's Abortion Ban*, 21 HEALTH HUM. RTS. 97, 98 (2019).
[5] *Id.*
[6] *Id.*
[7] Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-Ba127 7 (S. Kor.).
[8] Sung, *supra* note 47, at 280.
[9] *Id.* 282

if a pregnancy posed serious harm had a very high threshold – the risk has to be so great that the abortion was "indispensable in order to save her life or health."[10] Similarly, the rape exception was rarely utilized because it entailed having to prove the rape occurred – and rape is highly stigmatized in Korean culture.[11] Finally, there were additional barriers to using the exceptions like a spousal consent requirement.[12] Overall, these challenges meant that the act did not really alter the reality of abortion access for many South Korean people. Attempts to repeal the abortion provisions in criminal code also failed.[13]

However, authorities largely ignored the ban, and abortions were quite prevalent for much of the late 20th and early 21st centuries. Although a 2005 official study estimated the total number of annual abortions to be about 340,000 a year, researchers have suggested given the illegality of the procedures and people's subsequent unwillingness to participate in the study, actual numbers could possibly actually be closer to one or two million a year.[14] However, the government's attitude changed the mid-2000s, when it became concerned about low fertility rates, and it started enforcing the law as a way to combat the issue.[15] In 2005, the government invested the equivalent of over $100 billion U.S. dollars in new childbirth promotion policies.[16] In addition, social and religious groups started mobilizing against abortion during this time. The group "Pro-Life Doctors" began reporting hospitals providing abortion care to the authorities.[17]

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[10] *Id.* at 283.
[11] *Id.* at 283; Kim et al., *supra* note 48, at 79.
[12] Sung, *supra* note 47, at 283.
[13] *Id.* at 280.
[14] *Id.* at 291
[15] The Associated Press in Seoul, *supra* note 20.
[16] Sunhye Kim, *Reproductive Technologies as Population Control: How Pronatalist Policies Harm Reproductive Health in South Korea*, 27 SEXUAL AND REPROD. HEALTH MATTERS 6 (2019).
[17] *A Campaign to Legalise Abortion is Gaining Ground in South Korea*, THE ECONOMIST (Nov. 9, 2017), https://www.economist.com/asia/2017/11/09/a-campaign-to-legalise-abortion-is-gaining-ground-in-south-korea.

Wealthy and politically influential religious groups also campaigned against abortion.[18] The efforts were not particularly effective at discouraging people from seeking abortions, but they did succeed at increasing the price of obtaining one – from 2008 to 2013, the price of an illegal abortion increased tenfold.[19]

ii. Court Rulings 1985 – 2012

This was the context in which the first Constitutional Court ruling on the abortion ban emerged in 2012. However, this was not the first time that South Korea's courts had decided a case relating to abortion. In 1985, the Supreme Court affirmed the validity of the abortion ban and established that a fetus has a right to life. In 2008, the Constitutional Court also affirmed the fetal right to life.[20] Neither of the courts at that point had declared any corresponding rights of women or pregnant people. In the 2012 constitutional case, the petitioner was a midwife who operated a maternity clinic and performed an abortion.[21] She brought a constitutional complaint against the ban on doctors performing abortions, and in the case the court reviewed this ban as well as the ban on a pregnant person procuring an abortion.[22] In a vote of four to four, the court upheld the bans and stated that they were not against the constitution.[23]

iii. Aftermath of 2012 Decision

Following this ruling, various social justice organizations began to mobilize in support of reproductive rights. In 2015, Women with Disabilities Empathy formed a planning group built on pillars of reproductive rights and disability justice.[24] The group emphasized that abortion

[18] *Id.*
[19] *Id.*
[20] *Id.* at 285.
[21] Hunbeobjaepanso [Const. Ct.], Aug. 23, 2012, 2010Hun-Ba402 (S. Kor.).
[22] *Id.*
[23] *Id.*
[24] Kim et al., *supra* note 49, at 100.

rights alone were not enough – the reproductive rights movement had to also address the sterilizations and abortions forced on people with disabilities.[25] In this way, these activists drew from some of the core tenets of the reproductive justice movement. In 2016, the planning group re-organized and expanded, becoming the Sexual and Reproductive Rights Forum (the Forum), and including additional groups like Network for Global Activism (NGA), the Center for Health and Social Change, Korean Lawyers for Public Interest and Human Rights, and individual researchers.[26] This coalition engaged in a broad advocacy campaign for reproductive justice, including holding events and publishing literature on the issue.[27]

The group reframed the reproductive rights issue as one of women versus the government, as opposed to women versus the fetus.[28] Not only did the activists point to the abortion ban, but also the government's selective enforcement of the abortion ban, as evidence of the government's disregard for women's reproductive autonomy. The government only enforced the ban when it served a governmental purpose – but it had no regard for the health and life of the pregnant person. In addition, this selective enforcement belied the purported purpose of the bans of protecting fetal life – because the government failed to "protect" this life when it better suited their policy goals.[29] In emphasizing the role of the government in reproductive rights issues, the activist group again drew from foundational principles of reproductive justice. Like the reproductive justice framework, the movement in Korea emphasized the burden on the government to provide reproductive health care to its citizens.[30]

[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Kim et al., *supra* note 48, at100-101.
[30] *Id.* at 105.

Also in 2016, the Korean Ministry of Health and Welfare attempted to classify abortions as unethical and increase the penalties for doctors who performed them, which sparked massive protests.[31] Women's rights groups led the protests, which succeeded in pressuring the government to withdraw the bill.[32] In 2017, a petition was started calling on the new liberal president, Moon Jae-in, to amend the abortion ban.[33] The government had previously promised to respond to petitions that obtained more than 200,000 signatures – and this abortion petition had gained 235,000.[34] In response, the government declared it would begin to study potential policy changes relating to abortion.[35]

The final form of the activist coalition was the Joint Action for Reproductive Justice group, created in 2018, which included feminist groups, doctors' organizations, disability rights groups, youth activists, and religious groups.[36] This group worked not only on litigation to challenge the abortion ban again, but also on building public consensus in support of abortion rights.[37] The group also took an intersectional approach to its advocacy, and framed reproductive rights as a larger issue of social justice.[38] This approach also mirrors that of the reproductive justice movement, in connecting reproductive health care to wider issues like disability justice. In this way, this group functioned as a reproductive justice advocacy group, not just as one for reproductive rights.

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[31] Sunhye Kim, "*If Abortion Is a Crime, the State Is the Criminal": The Role of Reproductive Justice Movements in Challenging South Korea's Abortion Ban*, OXFORD HUM. RTS. HUB (July 27, 2021), https://ohrh.law.ox.ac.uk/if-abortion-is-a-crime-the-state-is-the-criminal-the-role-of-reproductive-justice-movements-in-challenging-south-koreas-abortion-ban/; *A Campaign to Legalise Abortion is Gaining Ground in South Korea, supra* note 62.
[32] *A Campaign to Legalise Abortion is Gaining Ground in South Korea, supra* note 62.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 101.
[37] *Id.*
[38] *Id.*

3. 2019 Abortion Ban Ruling

In 2019, victory was achieved – the Constitutional Court held the abortion bans were did not conform to the constitution. The petitioner in this case was an obstetrician-gynecologist who was indicted for performing an abortion.[39] In the case, the court found the abortion ban did not conform to the constitution because it violated women's right to self-determination; in order to realize this right, women must be allowed to make the decision to get an abortion until the 22nd week of pregnancy.[40] Activists point to their work of re-framing the abortion issue as a government and social tool, and of emphasizing the government's duty to protect reproductive rights, as influential in this victory.[41] Ultimately, many factors played a role – including shifts in public opinion, the changing political environment, and the new composition to the Constitutional Court, which gained several more liberal judges in the years since the 2012 opinion.[42]

However, the decision did not result in an immediate change – the legislature had until December 31, 2020 to amend the law.[43] Although bills to revise the ban were introduced, the National Assembly failed to pass any of them, so the abortion restrictions became null and void as of January 1, 2021.[44] This has left the status of abortion in South Korea in a state of limbo, with many doctors hesitant to perform the procedure because the parameters of its legality are

[39] Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-Ba127 1-2 (S. Kor.).
[40] Sayuri Umeda, *South Korea: Abortion Decriminalized since January 1,* LIBR. OF CONG. (2021), https://www.loc.gov/item/global-legal-monitor/2021-03-18/south-korea-abortion-decriminalized-since-january-1-2021/.
[41] Kim et al., *supra* note 48, at 105.
[42] Kim, *supra* note 76; *A Campaign to Legalise Abortion is Gaining Ground in South Korea, supra* note 62.
[43] Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-Ba127 43 (S. Kor.).
[44] Id.; https://www.loc.gov/item/global-legal-monitor/2021-03-18/south-korea-abortion-decriminalized-since-january-1-2021/

unclear.[45] Although South Koreans now have a negative right not to have the government interfere with their right to an abortion until the 22nd week, there still is no positive right guaranteeing access to affordable and safe abortion services in the country.[46]

4. Textual Analysis

i. 2012 South Korea Constitutional Court Decision

I start with the 2012 South Korea Constitutional Court that upheld the country's abortion ban to identify the effect that the reproductive justice movement had on litigation and judicial decisions regarding abortion. 2012 provides a logical starting point not only because the court affirmed the ban in terms that ignored women's constitutional rights, but also because it was before the reproductive justice movement really took off in the country. Scholars writing in 2012 note that "there are virtually no instances of Korean feminist movements that have made abortion the principal item on their agenda."[47] This would change following 2012, with significant advocacy from reproductive justice and other groups around abortion increasing until the 2019 decision. Therefore comparing the 2012 and 2019 Constitutional Court decision can help identify the effect that this advocacy had on the court's opinions.

The 2012 decision focuses heavily on the sanctity of human life and a fetus' right to life, and opines that criminal punishment is necessary to protect those rights.[48] The decision uses a rights-based framework that focuses almost exclusively on the fetus, with barely any mention of the rights of the pregnant person. In the first sentence of the court opinion, the justices state that

[45] Yoon So-Yeon*, Korea Decriminalized Abortion, But Has Anything Actually Changed?*, KOREA JOONGANG DAILY (July 2, 2022), https://koreajoongangdaily.joins.com/2022/07/02/why/Korea-abortion-pregnancy/20220702070028589.html.
[46] Kim, *supra* note 76.
[47] Sung, *supra* note 47, at 300.
[48] Hunbeobjaepanso [Const. Ct.], Aug. 23, 2012, 2010Hun-Ba402 (S. Kor.).

"the right to life is the most fundamental right among the basic human rights."[49] The court also makes sure to distinguish the fetus as its own separate entity entitled to the right to life on its own, separate from the mother.[50] Seemingly in response to those who would argue that abortion regulations should differ depending on the stage of the pregnancy, the court declares that "whether a fetus can independently live or not cannot be the criteria for allowing an abortion."[51]

The court's singular focus on the fetus and not the pregnant person is clear in its affirmation of the necessity of punishment – claiming that sex education, birth control, and support for pregnant women to prevent unwanted pregnancy are not enough to prevent abortions.[52] In regards to exceptions, the court allows for narrow circumstances in which abortions may be permissible due to mental disorders from genetic illnesses – which presumably was to leave the Mother and the Child Act intact.[53] However, the court determines that exceptions for social or economic reasons are unacceptable, because otherwise "the abortion statute will be meaningless, and abortions will happen so frequently that people will 'make light of human life.'"[54] The entire opinion is clearly in conflict with reproductive justice values, as it is nearly a complete repudiation of a person's right to abortion, but the specific refusal to allow for social or financial exceptions is particularly contradictory to what reproductive justice advocates for. The court fails to acknowledge the impact that social factors or financial hardship can have on a person's life, including their ability to birth and raise a child. The court also fails to acknowledge any corresponding rights of the pregnant person. The only mention of their rights in these situations is that criminal punishment is "hardly" an excessive restriction on the pregnant

[49] *Id.* at 95.
[50] *Id.*
[51] *Id.* at 95-96.
[52] *Id.* at 96.
[53] *Id.*
[54] *Id.*

person's right to self-determination.[55] Therefore although the court seemingly acknowledges a pregnant person's right to self-determination, it does not connect that right to anything concrete in relation to reproductive rights.

The dissenting opinion of four justices places a much greater weight on a pregnant person's right to self-determination and declares that failing to adjust abortion restrictions depending on the stage of pregnancy is a violation of this right.[56] However, this dissent still operates within the same rights framework of the majority opinion, and affirms the validity of the underlying purpose of the abortion ban of protecting a fetus's right to life. It focuses on how the ban is not the least restrictive means and fails to actually achieve this purpose because abortions still occur.[57] While this practical approach is more favorable to abortion rights, it still affirms the right of the state to limit a pregnant person's reproductive autonomy. This dissenting opinion also seems to introduce the idea of a weighing of the two rights – that of a pregnant person to self-determination and a fetus to life – against each other. In this way, the opinion establishes a pregnant person versus fetus framework that is variable depending on the stage of pregnancy.[58] Notably, there were four justices in support of this dissenting opinion – meaning that the court was evenly split even in 2012 on the issue of abortion.

ii. 2019 South Korea Constitutional Court Decision

The 2019 decision reflects significant progress in the court's understanding of reproductive justice. First and most obviously, the court established the necessity of allowing abortion at some stages of pregnancy. In addition, the court does acknowledge the significant

[55] *Id.*
[56] *Id.* at 98.
[57] *Id.*
[58] This is also the same kind of dichotomy that the reproductive justice movement tried to shift away from.

impact that pregnancy and parenthood can have on a person.[59] The court takes a full paragraph to explain the potential negative impacts of pregnancy, including physical burdens, pain, and risk of death.[60] The court also spends significant time discussing the impacts of parenthood, including the financial burden, emotional exertion, and difficulties maintaining a career.[61] The opinion explicitly acknowledges both that the burdens of parenthood are compounded by gender discrimination and that "women still suffer substantial socioeconomic disadvantage by virtue of becoming pregnant or giving birth; they also shoulder more of the parental burden than men in many cases."[62] These acknowledgements are very progressive compared to the 2012 decision, and reflect some of the values of the reproductive justice movement. The gender discrimination and socioeconomic disadvantage the court references are part of the "social, political, and economic systemic inequalities that impact women's reproductive health and their ability to control their reproductive lives" that reproductive justice advocates highlight.[63] The court's discussion takes a broader perspective on abortion rights, and illustrates how they are connected to broader social issues. This recognition of broader social justice issues is in line with how reproductive justice advocates pushed for people to understand abortion rights, and may have been at least partly a result of the public advocacy work activists in South Korea did around this issue.

Later in the decision, the court acknowledges the holistic nature of the reproductive decision-making process, again displaying a reproductive justice perspective. The court lists a multitude of factors that go into the decision to obtain and abortion, and declares that women

[59] *Id.* at 16
[60] *Id.* at 16
[61] *Id.*
[62] *Id.*
[63] Rachel Rebouché, *How Radical Is Reproductive Justice? Remarks for the FIU LAW REVIEW Symposium*, 12 FIU L. REV. 9, 16–19 (2016).

must be given sufficient time to consider them all.[64] While the list is not as comprehensive as it could have been, and neglects to address actual access, it still represents significant progress from the 2012 decision. Multiple times, the 2019 opinion refers to the decision to have an abortion as a "holistic" decision.[65] This is also in line with how the reproductive justice movement advocates people think about reproductive decision making and the concept of choice. Melissa Murray explains how reproductive justice activists sought to challenge abortion rights being framed as an issue of choice, without regard to the way in which, depending on one's circumstances, the notion of 'choice' could be severely constrained."[66] The court's rhetoric here embodies that change – acknowledging the impact of socioeconomic circumstances and national policies in reproductive decision making.[67] A main pillar of the reproductive justice framework is analyzing "how the ability of any woman to determine her own reproductive destiny is linked directly to the conditions in her community—and these conditions are not just a matter of individual choice and access."[68] This framework is reflective in the court's discussion of the abortion decision making process, and in establishing what women must be allowed time to consider. In addition, the court states that women must be allowed time to actually obtain an abortion. This shows acknowledgement of the difference between choice and access – although still not explicitly addressing access – and is another progressive passage in the opinion. Through all of this language, the court does display an understanding of reproductive justice values which reflects the tenacious work of many advocates, although overall the opinion still falls short of what the movement advocates for.

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[64] *Id.* at 18.
[65] *Id.* at 17-18, 30-31.
[66] Murray, *supra* note 3, at 2055.
[67] Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-Ba127 18 (S. Kor.).
[68] Ross, *supra* note 18.

In its 2019 decision on the same criminal abortion bans, the Constitutional Court held that they did not conform to the constitution because they violated pregnant people's right to self-determination. However, the court still affirms the importance of protecting fetal life, and determines that restrictions on abortion should therefore vary at different stages of pregnancy. While there is much progress in the language of this opinion compared to the 2012 decision, and reproductive justice values are undoubtedly more present, the court fails to fully embrace reproductive justice ideals through using a choice framework, ignoring the issue of access, framing the debate in terms of the pregnant person versus the fetus, and affirming the underlying basis of the 2012 decision. This is true of both the constitutional non-conformity and pure unconstitutionality opinions.

Applicant Details

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Applicant Education

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Date of BA/BS	**May 2014**
JD/LLB From	**Boston College Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12201&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Boston College Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 11, 2023

Honorable Chief District Judge Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Honorable Chief Judge Sánchez:

I am a rising third year law student at Boston College Law School and master's student at the Fletcher School for Law and Diplomacy at Tufts University, and I would be honored to serve as a law clerk for the 2024 – 2025 term. My past international and public service experience, legal research and writing skills, academic record, and work ethic make me a strong candidate for this position.

During the past two years of law school, I have held positions which required persistence, close attention to detail, the ability to communicate clearly both orally and textually, and a high level of reading comprehension. For example, I have served as a research assistant to Professor Bijal Shah, for whom I conducted research on federal agency discretion in internal policies and discriminatory effects of agency immigration policy. In addition, as a staff member and current Senior Editor of the *Boston College Law Review*, I have developed my editing, research, and writing skills by reviewing and revising my peers' writing and drafting a student Note on issues related to in *absentia trials* in international criminal law (publication decisions currently pending). When clerking, I will continue to hone these skills and further my intellectual curiosity within the law.

In addition, my public service background has led to a strong work ethic and drive that will serve well within the clerkship. Last summer, I interned at the Massachusetts Commission Against Discrimination as a Rappaport Fellow for Law and Policy, where I drafted legal orders pertaining to discrimination claims submitted from across the Commonwealth. Prior to law school, for five years I worked at the National Democratic Institute (NDI), where I helped implement several multi-million-dollar grants related to strengthening democratic processes through political party development, civil society expansion, election integrity, and women/LGBTQ political empowerment in Ukraine. Through these experiences, I learned how to navigate multiple demands within complex situations, be an effective advocate for my ideas, and work efficiently as an individual and as a team member.

As part of this application please find my resume, law school transcript, and writing sample. The writing sample consists of a sample motion to dismiss written for Boston College Law Review's write-on competition. Additionally, please find recommendation letters from Professors Michael Cassidy and Maryanne Chirba, and Clinic Professor Ashley Nyce. Please feel free to contact me at 914-523-8863 or sturr@bc.edu if you need additional information.

The opportunity to refine my legal skills and become a member of your clerkship community would be a tremendous honor. I hope to discuss my qualifications with you in greater depth and thank you for your consideration.

Respectfully,

Jonathan Sturr

Jonathan Sturr

45a Kilsyth Rd., Brookline, MA 02445 • Sturr@bc.edu • 914-523-8863

EDUCATION

Boston College, School of Law — Newton, MA
Candidate for Juris Doctor — May 2024
GPA: 3.70/4.00 (Top 25%)
Honors: Senior Editor, *Boston College Law Review*, 2023-2024; 2022 Rappaport Law and Public Policy Fellow
Activities: Lambda LGBTQIA Law Student Group Treasurer; Negotiation Competition Semi-Finalist

Tufts University, The Fletcher School of Law and Diplomacy — Medford, MA
Candidate for Master of Arts in Law and Diplomacy — May 2024

Columbia University — New York, NY
Bachelor of Arts, Double Major in History and Music, Minor in Russian Language and Culture — May 2014

EXPERIENCE

Department of Justice — Washington D.C.
Intern, Federal Programs Branch, Civil Division — July 2023 – August 2023

Human Rights Campaign (HRC) — Washington D.C.
McCleary Law Fellow — May 2023 – July 2023
- Supporting HRC's ongoing impact litigation concerning LGBTQ issues across the country
- Researching and analyzing newly passed anti-LGBTQ state legislation

Boston College Law School — Newton, MA
3:03 Student Attorney, Civil Litigation Clinic — January 2023 – May 2023
- Represented and advised four clients in civil litigation matters as part of the Boston College Law School Legal Services LAB
- Conducted client intake interviews, developed litigation strategies, engaged in client counseling, and drafted documents submitted to court related to landlord/tenant and special education access legal disputes

Boston College Law School — Newton, MA
Research Assistant, Professor Bijal Shah — August 2022 – December 2022
- Conducted administrative law research on potential federal agency biases in the formation and implementation of immigration policies
- Researched and analyzed federal agency policy manuals related to agency discretion

Massachusetts Commission Against Discrimination (MCAD) — Boston, MA
Legal Intern, Investigations Unit — June 2022 – August 2022
- Reviewed motions and drafted legal orders in response to ongoing MCAD employment, housing, and public accommodation discrimination complaints submitted by involved parties
- Conducted research on the shifting state and federal case law surrounding workplace discrimination

National Democratic Institute (NDI) — Kyiv, Ukraine/Washington, DC
Senior Program Officer, Kyiv, Ukraine — March 2018 – July 2020
- Supported implementation of NDI's democracy and human rights programming in Ukraine, including political party organization, election strengthening, civil society engagement, and women's political involvement
- Organized multiple international observation missions for Ukraine's presidential and parliamentary elections
- Designed and managed budgets for 11 open grants from donors, totaling $33 million dollars in funding

Senior Program Assistant, Washington, DC — September 2015 – March 2018
- Provided administrative, financial, and logistical guidance for NDI programs in Ukraine
- Prepared quarterly and annual reports for various international donors on NDI's programming in Ukraine
- Hired, trained, and supervised interns

LANGUAGE SKILLS AND INTERESTS

- **Languages:** Russian (Intermediate); Spanish (Beginner)
- **Interests:** Classical Music; Running, Skiing; International Travel; Baking Desserts

BOSTON COLLEGE

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DATE PRINTED: 06/06/2023

FALL 2021 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2110	CRITICAL PERSPECTIVES IN LAW AND PROFESSIONAL IDENTITY	01	01	P
LAWS2120	CIVIL PROCEDURE	04	04	A-
LAWS2130	CONTRACTS	04	04	A-
LAWS2140	PROPERTY	04	04	A
LAWS2150	LAW PRACTICE 1	03	03	A-

			ATT	EARN	UNITS
TERM GPA:	3.758	TERM TOTALS:	16	16	15
CUM GPA:	3.758	CUM TOTALS:	16	16	15

SPRING 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2125	CONSTITUTIONAL LAW	04	04	A-
LAWS2135	CRIMINAL LAW	04	04	A-
LAWS2145	TORTS	04	04	A-
LAWS2155	LAW PRACTICE II	02	02	A-
LAWS8899	INTRODUCTION TO LANDLORD TENANT PRACTICE	03	03	A-

			ATT	EARN	UNITS
TERM GPA:	3.670	TERM TOTALS:	17	17	17
CUM GPA:	3.711	CUM TOTALS:	33	33	32

FALL 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2190	PROFESSIONAL RESPONSIBILITY	02	02	B
LAWS4460	PROSECUTORIAL ETHICS	02	02	A-
LAWS9926	TAXATION I (INDIVIDUAL INCOME TAXATION)	04	04	A-
LAWS9996	EVIDENCE	04	04	A-
LAWS9999	LAW REVIEW	01	01	P

			ATT	EARN	UNITS
TERM GPA:	3.558	TERM TOTALS:	13	13	12
CUM GPA:	3.670	CUM TOTALS:	46	46	44

SPRING 2023 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS7731	ADMINISTRATIVE LAW	03	03	A-
LAWS8452	ADVANCED EVIDENCE: TRIAL OBJECTIONS	03	03	A-
LAWS8978	CIVIL LITIGATION CLINIC	06	06	A
LAWS9999	LAW REVIEW	03	03	P

			ATT	EARN	UNITS
TERM GPA:	3.835	TERM TOTALS:	15	15	12
CUM GPA:	3.705	CUM TOTALS:	61	61	56

TOTAL CREDITS EARNED : 61 CUM GPA : 3.705

END OF RECORD

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Bryan D. Jones
University Registrar

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Candidacy of Jonathan Sturr

Dear Judge Sanchez:

I am writing to enthusiastically recommend Jonathan Sturr's application to serve as a judicial clerk in your chambers. Jonathan is an exceptional legal researcher and writer, as well as thoughtful and dedicated young lawyer who approaches his work with professionalism and a deep desire to develop his skills as a public interest advocate.

I had the pleasure of directly supervising Jonathan from January 2023 through May 2023 when he was a student attorney in the Civil Litigation Clinic (CLC) at Boston College Law School. Student attorneys engage in rigorous clinical and academic work, grappling with the complex and interconnected systems that negatively impact individuals, children, and families across a variety of civil legal areas including housing, education, public benefits, and family law matters. Through direct client advocacy, close supervision, and weekly seminars, student attorneys engage in every aspect of their client's case, from developing the facts and theory of the case, to case planning and client counseling, to written and oral advocacy. The Civil Litigation Clinic is a significant commitment and requires the ability to efficiently and methodically adapt to rapidly changing casework, as well as excellent case management skills. Throughout my time working with Jonathan, I found him to be a thoughtful and dedicated advocate who is deeply committed to his casework and a career in public service.

First, Jonathan demonstrates thoughtfulness and thoroughness in his legal research. Not only does Jonathan consistently engage in comprehensive legal research, but he also demonstrates the ability to efficiently apply that research to time-sensitive casework. For example, over the course of the semester, Jonathan represented a client who sought the return of his security deposit from a former landlord. Jonathan engaged in comprehensive legal research to identity the client's legal rights within the jurisdiction and evaluate the strength of his security deposit claim. Ultimately, Jonathan's research indicated that while the client was likely entitled to the return of his deposit, due to several key facts stemming from the tenancy, the client was actually at risk of owing more in damages than the value of his deposit. Jonathan was able to provide exceptional counseling to the client regarding the strengths and weaknesses of his claims and strategize with the client regarding how to proceed in a manner that aligned with the client's goals of avoiding litigation. Despite Jonathan's fantastic legal research skills, he intentionally sought opportunities to further build these skills as a student attorney. Jonathan took the opportunity to collaborate with the law library to develop a legal research system that allowed him to even more methodically, as well as efficiently, organize and apply his legal research, further strengthening his already excellent research skills.

Second, I found Jonathan's legal writing skills to be exceptional. Jonathan demonstrates tremendous strength in both objective legal writing as well as persuasive writing, strategically and effectively adapting his tone, language, structure, and presentation for the intended audience. Jonathan is intentional with every word, crafting written work that is concise yet comprehensive, and deeply mindful about the reader's experience in consuming any written work. For example, in crafting communications relating to a complex housing matter for a Spanish speaking client, Jonathan grappled with not only the content presented, but also the format and structure with which information was shared, working with his clinic partner to visually present the pros and cons of different advocacy strategies and how those strategies aligned with the client's goals. Jonathan was especially thoughtful about the fact that all communications, including detailed advice and counsel letters, must ultimately be translated and that simple, concise language often results in the most effective translated materials.

Third, Jonathan brings the same intentionality to his oral advocacy, and consistently demonstrated the strongest oral advocacy skills within his clinical section. Jonathan has an innate ability to connect with a variety of stakeholders and navigate both formal oral advocacy events such as a court appearance, as well as informal advocacy events such as a highly contentious meeting with school district personnel. He approaches oral advocacy with tremendous preparation, while demonstrating the ability to adapt to rapidly changing circumstances, whether answering a series of questions posed by a decision-maker or managing complex and adversarial comments from an opposing party during negotiations. Jonathan approaches these moments with the utmost professionalism while maintaining his client's goals at the forefront of his advocacy.

Lastly, Jonathan is an absolute joy to work with, and is a kind, good-natured, humorous, and curious colleague. Not only is Jonathan an exceptional communicator and collaborator with the ability to work independently as well as with a team, but he is also a dedicated young lawyer committed to his own professional growth, consistently striving to further his professional skills. I have no doubt that Jonathan will perform his duties with diligence, curiosity, and tremendous care.

Thank you for the opportunity to express my full support for Jonathan Sturr. Please do not hesitate to contact me if you have any questions at (805) 570-5960 or at ashley.nyce@bc.edu.

Sincerely,

Ashley Nyce

Ashley Nyce - nycea@bc.edu

Ashley Nyce - nycea@bc.edu

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Candidacy of Jonathan Sturr

Dear Judge Sanchez:

Please accept this letter in support of Jonathan Sturr's application for a judicial clerkship following his graduation from Boston College Law School in May 2024. I had the great pleasure of teaching Jonathan throughout his 1L year in a five credit, two semester curriculum entitled "Law Practice 1 and 2." Together, these companion courses tackle the fundamental lawyering skills of legal research, legal analysis and written communication. Because each draft of each memo received individualized feedback in the form of my written comments (taking an average of two hours per draft) and one-on-one conferences, I had ample opportunity to get to know Jonathan and assess his analytical capabilities.

Jonathan is an exceptional young man in every respect and I recommend him most highly. He is extremely smart, hard-working, organized and methodical. Whether the assignment involved an in-depth written analysis of an intractable legal issue or an extemporaneous oral critique of a new case, Jonathan never failed to produce a superior work-product. His questions in class showed that he not only understood the material, but had prepared so thoroughly that he was several sessions ahead of the class.

Moreover, despite the demands of a grueling first year curriculum, Jonathan never lost his sense of perspective or balance because he knows how to take his work quite seriously without taking himself too seriously. It came as no surprise to me when his talent and hard work earned him a spot in the top 5% of my course along with the respect and good will of his very talented and competitive peers.

Given Jonathan's intellect, maturity, warmth and wit, I have no doubt that he will be an excellent judicial clerk. I can assure you that he will remain grounded and calm under pressure. He will see nuances in a case that the sharpest litigants missed. Most importantly, you will be able to trust him to get it right, rely on him to get it done (and typically ahead of time!), and you will genuinely enjoy working with him.

Simply put, Jonathan Sturr is outstanding in every good way and I recommend him with the greatest enthusiasm and without hesitation. Please contact me at 502\8.320.5175 or maryann.chirba@bc.edu if you have even the slightest reservation. Thank you so much for considering his candidacy.

Most sincerely,

Mary Ann Chirba, JD, DSc, MPH
Boston College Law School

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Candidacy of Jonathan Sturr

Dear Judge Sanchez:

I write to recommend Jonathan Sturr, Boston College Law School Class of 2024, for a clerkship with your chambers during the 2024-25 term.

I have taught Jonathan Sturr in two courses. Jonathan was a student in my Criminal Law course during his first year of study. He was an eager and energetic student, and I was not surprised to learn at the end of the semester that he earned an "A-" on my blindly-graded exam. Jonathan was consistently well prepared for class and would regularly offer insightful comments during class discussions. I could tell from his penetrating questions -- both during and following class-- that Jonathan had an intellectual curiosity and a solid grasp of the material. I also had Jonathan as a student in my Evidence course in the fall semester of his second year. Once again, Jonathan was a star student. I could always count on Jonathan for an answer to my questions that advanced the learning of others. Jonathan earned an "A-" on the final exam in Evidence.

Jonathan Sturr is a very bright, ambitious, and hard-working young man. He has earned an impressive 3.67 GPA to date at BC Law, putting him roughly in the top 15% of a very competitive class. His written work is clear, well organized, and analytically persuasive. His research and writing abilities have been augmented by his service on the Boston College Law Review.

Jonathan is committed to a career in public interest law. He will be "splitting" the summer between his 2Ls and 3L years between the Department of Justice and Human Rights Watch in Washington, D.C. Jonathan was selected for our highly competitive Rappaport Fellowship in Law & Public Policy to support him in his work.

I have no doubt that Jonathan Sturr has the intellectual and analytical ability to do a really terrific job for you. What I believe sets him apart from other top clerkship candidates in the BC Law Class of 2024 is his maturity and prior work experience. As you will see from his resume, Jonathan held important positions in government and NGO after graduating from Columbia University, including working on Vice President Biden's staff and serving with the National Democratic Institute in the Ukraine. Jonathan's interest in human rights and international politics has led him to pursue our joint degree with the Fletcher School of Law and Diplomacy at Tufts, where he will earn his Masters in 2024.

I am confident this young man is going places, and that you would be honored to add him to the list of promising attorneys who started their careers by clerking for you. Perhaps most importantly, I am certain that you and your staff would really enjoy working with Jonathan. He has a very engaging personality, a robust sense of humor, and a wide variety of outside interests (Among his many abilities, he is a classical bassoonist!). "Smart" and "nice" do not always go hand in hand, but this young man is a very refreshing exception. I always have a smile on my face after talking with Jonathan Sturr. He is simply terrific.

Please do not hesitate to contact me at (617) 552-4343 if I can provide you with any further information about this outstanding candidate.

Sincerely,
R. Michael Cassidy
Professor of Law and
Dean's Distinguished Scholar

Writing Sample

The following is memoranda in law in support of a motion to dismiss submitted as part of Boston College Law Review's (BCLR) write-on competition. For the competition, BCLR provided the prompt for the motion, determined the side we are representing (the defendant), listed general background facts, and provided a list of ten authorities that may be used to support our legal arguments. BCLR did not allow any additional legal research.

Note that BCLR provided the language in the yellow highlighted portions (the first page of the memo and heading below the argument section) as part of the required memo template and remains included in the writing sample for contextual purposes. Beyond the brief highlighted portions, all writing in this memo represents my original work and has not been seen or edited by anyone else.

STATE OF MINNESOTA **COUNTY OF BLUE EARTH**	**DISTRICT COURT** **FIFTH JUDICIAL DISTRICT**
STATE OF MINNESOTA, **Plaintiff,** **vs.**	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**
MICHAEL VARNSEN, **Defendant.**	**File No.: 22-1695**

The Defendant, Michael Varnsen, has moved to dismiss the above-captioned complaint charging him with 5th Degree Sale of a Controlled Substance in violation of Minnesota Statute 152.025. The Defendant moves the Court to dismiss the complaint on the grounds that he was entrapped by Detective Daniel Landry of the Mankato Police Department. Pursuant to Rules 26.01 and 9.02 of the Minnesota Rules of Criminal Procedure, the Defendant has waived his right to present the entrapment defense to a jury and now submits the defense to the Court for its determination. To expedite the Court's determination of this motion, the Defendant and the State have stipulated to certain facts for the purpose of the motion; the parties have filed the stipulation with the Court.

Detective Landry induced the Defendant to commit the crime with which he is charged and because the State cannot prove beyond a reasonable doubt that the Defendant was predisposed to commit that crime, this Court must dismiss the complaint against the Defendant.

STATEMENT OF THE CASE

Michael Varnsen is a 31-year-old part-time mechanic currently residing in Mankato, Minnesota with his girlfriend and her daughter. Stip. at 1-2. He has two prior convictions on his record that occurred over a decade ago: a possession of marijuana charge when he was 18 years old and the transferring of stolen property (an MP3 player) when he was 19 years old. Stip. at 3.

On March 21, 2022, Detective Daniel Landry of the Mankato Police Department was engaged in an undercover investigation of narcotics sales. Stip. at 4. Upon receiving information from a confidential informant of marijuana sales in the area, Landry drove to Moreland Avenue where he saw Varnsen and another man standing outside. Stip. at 6. Detective Landry approached and asked Varnsen if he knew where to buy weed, to which Varnsen replied "nope." Stip. 8. Detective Landry then responded that he heard someone sold weed in the area, to which Varnsen replied "Not us." Id. After the clear denial from Varnsen, Landry walked away and continued to wonder the premises searching for weed. Stip. at 9.

After forty-five minutes of searching and failing to find marijuana, Landry returned and asked Varnsen for weed again. Stip. at 11. Landry said he was a veteran with PTSD and begged Varnsen for help. Stip. at 12. After Varnsen again said no, Landry asked him for contact information of a dealer. Id. Varnsen relented to the pressure and said he might know another veteran who could help. Id. After making a phone call, Varnsen led Landry to a house close by and asked Landry how much weed wanted. Stip. at 14-15. Varnsen then left, returned five minutes later with the requested weed, and exchanged it with Landry for the agreed price of $80. Stip. at 16-18. As soon as Landry gained possession of the weed, he arrested Varnsen and charged him with 5th degree sale of a controlled substance. Stip. at 18.

ARGUMENT

This Court must grant Defendant's motion to dismiss on the grounds of entrapment because (1) the preponderance of evidence demonstrates that the Government induced Mr. Varnsen to commit the charged offense, and (2) the State has failed to meet its burden of demonstrating beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the offense of selling marijuana.

Entrapment is an affirmative defense that enables defendants to prove that the government unfairly induced them to commit a crime they would have not otherwise committed. See State v. Poague, 72 N.W.2d 620, 625 (Minn. 1955). Per State v. Grilli, the defendant may present the defense to the jury as part of the trial proceedings or waive their right to the jury and present the defense to the judge as a matter of law. 230 N.W.2d 445, 455 (Minn. 1975). If the judge agrees with the defense, then the state is barred from further prosecuting the crime. Id. Otherwise, the defendant may not present the claim to the jury. Id.

In Minnesota, the courts have adopted a two-part "subjective test" to evaluate entrapment claims. Id. at 453. First, the defendant must establish by the preponderance of the evidence that the state induced the defendant to commit the crime by "improper pressure, badgering, and persuasion. Id. at 452. If the defendant is able to establish inducement, the state then has the burden to prove beyond a reasonable doubt that the defendant was "predisposed" to commit the crime. Id. In the present case, the government went well beyond mere solicitation and induced the Defendant to sell marijuana despite his lack of predisposition to commit the crime.

a. The Government Induced the Defendant by Badgering and Pressuring him to Sell Marijuana

In order to prove inducement, the defendant must show by the preponderance of the evidence that the state did more than merely solicit the commission of the crime. State v. Olkon, 299 N.W.2d 89, 107–108 (Minn. 1980). Steps beyond solicitation include improperly

pressuring, badgering, or persuading the defendant to commit a crime. Id. For example, in State v. Johnson, the court determined the state induced the defendant by the preponderance of the evidence when the police officer continued to pressure the defendant to buy marijuana after he initially refused. 511 N.W.2d 753, 755 (Minn. Ct. App. 1994). Conversely, in State v. Bauer, the court held that the police did not induce the defendant because the defendant initiated the sale of the drugs and was never subject to "improper pressure, badgering, or persuasion" by the state. 776 N.W.2d 462, 470–471 (Minn. Ct. App. 2009). Similarly, in State v. Lombida, the court found that the defendant willingly met with the officer on multiple occasions to complete the drug sale and there was no pressure from the officer beyond his solicitation for the drugs. No. A11-537, 2012 WL 1380264, at *3 (Minn. Ct. App. Apr. 23, 2012).

In the present case, Detective Landry clearly badgered and exerted improper pressure that led to Varnsen facilitating the marijuana sale. See id. Just like the police officer badgering the Defendant to buy the drugs in Johnson, Detective Landry continued to pressure Varnsen even after he denied having weed. See 511 N.W.2d at 755. It was this relentless begging over the course of two separate encounters that caused Varsen to finally give-in and help Landry find weed. During their first encounter, Detective Landry solicited Varnsen for weed twice, only for Varnsen to firmly deny both times that he sold weed. Stip. 8. Having not accepted Varnsen's clear rejection, Detective Landry returned forty-five minutes later and began to relentlessly beg Varnsen for weed. Stip. 12. Unlike in Lombida where the defendant willingly met the officer with the drug sale, Varnsen never initiated an interaction with Landry or showed willingness to engage. See WL 1380264, at *3. Even when Landry began to falsely proclaim that he suffered from PTSD and badgered Varnsen to "help [him] out." Varnsen still

denied having any weed. Landry refused to leave Varnsen alone, proclaiming he "really needed [the weed]" and implored Varnsen to call someone. Stip. 12. Finally, Varnsen relented to Landry's pressure and called someone to obtain weed. Stip. 13. Decetive Landry was successful in persuading Varnsen to sell him weed through excessive badgering and pressure on multiple occasions. As a result, Detective Landry clearly induced Varnsen to commit the crime.

Furthermore, the criminal intent originated not with Varnsen, but with the government. See Grilli, 230 N.W.2d at 451. Entrapment can occur when the criminal design "originates, not with the accused, but is conceived in the mind of the government officers . . . ." Id. (quoting Newman v. United States, 299 F. 128, 131 (4th Cir. 1924)). There is no evidence in the present case that Varnsen ever had any intention to sell weed. Varnsen was merely standing outside in his neighborhood, and it was Detective Landry who approached and solicited the drugs. Stip. at 8. When Landry's first encounter with Varnsen failed to produce weed, he returned a second time with the goal was to convince Varnsen to break the law. Stip. at 10. It was only through Landry's badgering and persuasion that Varnsen agreed to help, and as a result did not have any original intent to sell weed. See Grilli, 230 N.W.2d at 45.

Consequently, the court must reject the Plaintiff's argument that Detective Landry did not badger the Defendant, but merely set a trap for solicitation. See Poague, 72 N.W.2d at 625. In Poague, the court established that officers are allowed to engage in "artifice and stratagem" to "catch those engaged in criminal enterprises." Id. But, unlike the defendant in Pogue who was willing to commit the offense and was "simply afforded … the opportunity to do so," Varnsen was never willing to commit the offense. Id. Even after the officer told the lies related to his PTSD, Varnsen did not want to sell the drugs to him. Stip. at 12. Additionally, the fact

that Detective Landry knew through his experience that drug dealers typically do not sell to strangers does not excuse his badgering and cajoling. Stip. at 10. As a result, the Government has no proof that Varnsen was anything but a law-abiding citizen and was improperly induced by Detective Landry to sell him weed.

b. The Defendant's Past Convictions Fail to Prove Beyond a Reasonable Doubt that he was Predisposed to Sell Marijuana

The government must prove beyond a reasonable doubt that the defendant was predisposed to commit the drug sale. Grilli, 230 N.W.2d at 452. The Minnesota courts have defined predisposition as "whether it was [defendant's] own original intent to commit the crimes charged." State v. White, 332 N.W.2d 910, 911 (Minn. 1983). In order to prove predisposition, the government may look to defendant's: active solicitation to commit the crime, prior criminal convictions, prior criminal activity not resulting in conviction, criminal reputation, and any other adequate means. Olkon, 299 N.W.2d at 107–108. For example, the court found in State v. Potter that the defendant had a predisposition to sell drugs because he had a criminal reputation, actively solicited the crime, and had a history of drug use. No. CX-97-1147, 1998 WL 171346, at *3 (Minn. Ct. App. Apr. 14, 1998). Moreover, in Olkon the court found that the defendant's willingness to comply with the solicitation can prove predisposition. 299 N.W.2d at 108. The court further clarified that other adequate means to prove predisposition can be "evidence that the accused readily responded to the solicitation of the commission of a crime by the state." Id.

Unlike the defendants in both Olkon and Potter, there is no evidence in the present case that the Defendant was predisposed to commit the crime of selling marijuana. See 299 N.W.2d at 108; 1998 WL 171346, at *3. Varnsen does not have a criminal reputation for selling drugs of any kind, a history of drug use, or prior criminal history not resulting in a conviction. Stip.

at 3. In addition, Varnsen did not actively solicit the crime and actively refused to comply with Detective Landry's badgering requests to purchase weed. Stip. at 8–12. The Government may try to use the call from the confidential informant as evidence of predisposition, but in fact, the confidential informant never identified Varnsen as the source of the drug sales on Moreland Avenue. Stip. at 5.

Furthermore, the Defendant's prior criminal convictions are not enough to prove predisposition to selling drugs beyond a reasonable doubt because these convictions do not address his *intent* to sell. See In re Welfare of E.E.B., No. A08-0893, 2009 WL 1374313, at *2 (Minn. Ct. App. May 19, 2009). In re Welfare of E.E.B., the court ruled that mere evidence of the defendant's prior drug use was insufficient to establish intent to sell drugs. See 2009 WL 1374313, at *2. The court outlines admissible evidence for intent to sell, including evidence of packaging drugs for sale or possession of a large quantity of drugs that goes beyond personal consumption. White, 332 N.W.2d at 911.

Like the defendant's previous illegal drug use in E.E.B., neither Varnsen's previous drug possession charge nor his transfer of stolen property charge proves his intent to sell because they are unrelated illegal behaviors. See WL 1374313, at *2. Mere possession of marijuana clearly does not meet the criteria set out in White for acceptable evidence to prove intent. See 332 N.W.2d at 911. Varnsen only had a small quantity of marijuana in his possession and the quantity he possessed was not packaged in a way that indicated it was for sale. If the court were to accept Plaintiffs argument that Varnsen's possession of marijuana is proof of predisposition, this would be a gross overreach of the White criteria and unnecessarily create liability for a crime that innocents never intended to commit. See 332 N.W.2d at 911. Varnsen's prior transfer of stolen property also does not prove intent because the stolen item

transferred was an Mp3 player and not an illegal substance like marijuana. Stip. at 3. The court in White pointed to specific evidence that can prove intent to sell drugs, and to equate the sale of a stolen Mp3 player to massive amounts of drugs or packaging drugs would be illogical and against established precedent of the court. See 332 N.W.2d at 911. As a result, neither of Varnsen's previous convictions can prove beyond a reasonable doubt that he had the predisposition to sell drugs.

In addition, Varnsen's prior convictions are temporally too distant to the current alleged crime to prove predisposition. See Johnson, 511 N.W.2d at 755. In Johnson, the court established that predisposition beyond a reasonable doubt cannot be proven through involvement in criminal convictions. See id. The defendant in Johnson had been involved in marijuana transactions almost twenty years prior to the events of the case. Id. at 754. The Johnson court was unwilling to allow this prior involvement as evidence of predisposition because that would open the door for "anyone ever involved with drugs would-for entrapment purposes-be forever 'predisposed' to sell drugs." Id. at 755. Similarly, Varnsen also has prior convictions that are temporally disconnected to his alleged criminal offense. Both of his criminal convictions occurred ten years prior to the current case and there is no evidence of Varnsen's involvement with any other criminal activity since those two crimes. Although Varnsen's criminal convictions are closer in time than the conviction in Johnson, since ten years represents a significant amount of time, the Johnson holding is still relevant to the case at hand. As a result, the government cannot use defendant's prior criminal convictions as proof of predisposition and overall, the government has no adequate means to prove beyond a reasonable doubt that Varnsen was predisposed to selling drugs. 511 N.W.2d at 755.

CONCLUSION

The court should grant the Defendant's motion to dismiss on the grounds of entrapment because under the preponderance of the evidence the state induced Varnsen to commit the crime and the state cannot prove beyond a reasonable doubt that Varnsen was predisposed to selling marijuana. Detective Landry approached Varnsen on multiple occasions without consent and improperly badgered, pressured, and persuaded Varnsen to sell him marijuana. Varnsen only complied because of this improper persuasion and never willingly engaged with Detective Landry in order to sell marijuana. Additionally, Varnsen's decade old criminal convictions are unable to prove beyond a reasonable doubt that he had a predisposition to sell drugs because they do not prove criminal intent to sell and are too temporally disconnected to the current crime. As a result, Detective Landry clearly entrapped Varnsen and the court must grant the motion to dismiss in the Defendant's favor.

Applicant Details

First Name	**Nikhyl**
Last Name	**Sud**
Citizenship Status	**U. S. Citizen**
Email Address	**wrk9wc@virginia.edu**
Address	**Address** Street **1980 Arlington Blvd, Apt H** City **Charlottesville** State/Territory **Virginia** Zip **22903** Country **United States**
Contact Phone Number	**603-965-6887**

Applicant Education

BA/BS From	**University of Pittsburgh**
Date of BA/BS	**April 2018**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Law & Business Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Lile Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Bowers, Josh
jbowers@law.virginia.edu
434-924-3771

Rombeau, Charles
crombeau@gmail.com

Forde-Mazrui, Kim
kfm@law.virginia.edu
(434) 924-3299

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nikhyl Sud
1980 Arlington Blvd., Apt. H, Charlottesville, VA 22903 | wrk9wc@virginia.edu | (603) 965-6887

June 12, 2023

The Honorable Juan R. Sanchez
James A. Byrne U.S. Courthouse
601 Market Street, Room 8613
Philadelphia, PA 19106-1797

Dear Judge Sanchez:

I am a rising third-year student at the University of Virginia School of Law and current summer associate at the law firm Covington & Burling. I am writing to apply for a clerkship in your chambers beginning in 2024.

Enclosed please find my resume, law school transcript, and writing sample. The writing sample is a note written for my Race and Criminal Justice class, examining due process guarantees extended to students faced with short suspensions. Additionally, letters of recommendation from the following individuals are included with my application:

Professor Josh Bowers
University of Virginia School of Law

Professor Kim Forde-Mazrui
University of Virginia School of Law

Mr. Charles Rombeau
Assistant United States Attorney, District of New Hampshire

If there is any other information that would be helpful in evaluating my candidacy, please let me know. Thank you for your consideration.

Respectfully,

Nikhyl Sud

Nikhyl Sud

1980 Arlington Blvd., Apt. H, Charlottesville, VA 22903 | wrk9wc@virginia.edu | (603) 965-6887

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024

- GPA: 3.56
- Mock Trial, 1L & 2L Captain, 2021 UVA Law Trial Advocacy Competition Finalist
- William Minor Lile Moot Court Competition
- *Virginia Law & Business Review*, Senior Editor
- South Asian Law Student Association

University of Pittsburgh, Pittsburgh, PA
B.S., Economics (Minor: American Politics), with Honors, *magna cum laude*, April 2018

- Mock Trial, Vice President
- Academic Resource Center, Tutor
- Communication Department Speech Lab, Speech Coach

EXPERIENCE

Covington & Burling LLP, New York City, NY
Summer Associate, May 2023 – Present

United States Attorney's Office, Concord, NH
Intern, May 2022 – August 2022

- Conducted comprehensive legal research and drafted memorandums examining 4th Amendment motions to suppress evidence, electronic discovery, jurisdictional components of federal statutes, and evidentiary hearings, among others
- Authored a successful pre-trial detention motion
- Aided in trial and appellate argument preparation

Teach for America, Tulsa Public Schools, Will Rogers College Jr. High School , Tulsa, OK
7th Grade Math Teacher/Team Lead, July 2018 – July 2021

- Planned and delivered lessons, reviewed assignments and examinations, provided oral and written feedback to students
- Created math lesson plan bank for current and future staff
- Helped students achieve an average of 1.4 years of academic growth in final year
- Founded and coached school's mock trial team
- Selected as Teacher of the Month by Tulsa Community in Schools in January of 2019

Federal Home Loan Bank, Pittsburgh, PA
Community Investment Intern, April 2017 – August 2017

- Analyzed and summarized community lending and affordable housing policy
- Assisted in development of bank's "Blueprint Communities" initiative, targeting funding to over 50 low-income communities in the Pittsburgh and Philadelphia areas

Office of the Governor of New Hampshire, Concord, NH
Legislative Intern, April 2016 – August 2016

- Drafted mailings to constituents regarding public policy developments
- Attended, summarized, and analyzed state legislature hearings for governor's policy advisors

HOBBIES & INTERESTS

Hiking, jazz, doubles tennis, chess, slow-pitch softball

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Nikhyl Sud

Date: June 07, 2023
Record ID: wrk9wc

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	B+	Woolhandler,Nettie A
LAW	6002	Contracts	4	A-	Johnston,Jason S
LAW	6003	Criminal Law	3	B+	Frampton,Thomas Ward
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	B+	White,George E
		SPRING 2022			
LAW	6001	Constitutional Law	4	B+	Solum,Lawrence
LAW	6104	Evidence	3	A-	Schauer,Frederick
LAW	6113	Intro to Law and Business	2	B+	Geis,George Samuel
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	6006	Property	4	A-	Johnson,Alex M
		FALL 2022			
LAW	9077	Asian Amer and the Law	2	B+	Law,David S.
LAW	8004	Con Law II: Speech and Press	3	A-	Schauer,Frederick
LAW	7179	Race and Criminal Justice	3	A-	Bowers,Josh
LAW	9081	Trial Advocacy	3	A-	Livingston,Ronald L
LAW	8018	Trusts and Estates	3	B+	Cahn,Naomi Renee
		SPRING 2023			
LAW	7019	Criminal Investigation	3	A	Armacost,Barbara Ellen
LAW	7184	Innovating for Defense	3	A-	Nachbar,Thomas B
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	7078	Remedies	3	A-	Laycock,H Douglas

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to highly recommend Nikhyl Sud for a clerkship in your chambers. I am a Professor of Law at the University of Virginia School of Law. Additionally, I have clerked for the Honorable Dennis Jacobs of the Second Circuit Court of Appeals.

During the 2022 fall semester, Nikhyl enrolled in my seminar, “Race & Criminal Justice.” The upper-level course tackled pressing moral, prudential, and jurisprudential questions (about, for instance, racial disparities in enforcement, prosecution, and punishment). Many students become somewhat paralyzed when presented with tough normative and policy questions for which there are no obvious black-letter doctrinal answers. But Nikhyl engaged ably with the difficult class materials and offered constructive in-class comments and responses to the readings. I was impressed right from the start. He consistently offered insights that moved class discussions in fruitful directions. I found particularly astute his insights about the school-to-prison pipeline—insights informed by his experience as a member of Teach for America.

Nikhyl is exceptionally hard working, diligent, and well prepared. And, most importantly for your purposes, he is a very strong writer. His final seminar paper was one of the best in the class—a thoughtful examination of the harms imposed by even short-term school suspensions. Nikhyl concluded that, in light of these empirically demonstrable harms, students should enjoy greater due process protections against prospective suspensions. The paper was not only substantively strong but also extremely lucid. His prose was powerful and persuasive. Nikhyl has an innate understanding for the proper tone and structure necessary to support and coherently present a set of legal arguments and conclusions—skills that will serve him well as a law clerk. Nikhyl and I have since discussed his plans to expand upon his final project, and I have encouraged him to develop it into a published student Note.

You may notice that Nikhyl received only an A- for my seminar—a stellar grade but one that does not quite reflect the quality of Nikhyl’s phenomenal coursework. Unfortunately, I was hamstrung by a strong class and a strict curve, which left me with the opportunity to award too-few solid A’s¬. If I could have given a couple more solid A’s, one would have gone to Nikhyl. He well deserved the mark. But Nikhyl is more than just an exceptional student and writer. He is admirably active and engaged. He has participated in mock trial since college. He was a finalist in the 2021 UVA Law Trial Advocacy Competition, and he is a current team captain. He is on the managing board of the Virginia Law & Business Review. And he is active in the South Asian Law Student Association.

Finally, I would like to highlight Nikhyl’s experience with Teach for America as a junior high school teacher at an at-risk junior high school in Tulsa, Oklahoma. Like Nikhyl, I was a member of Teach for America after college. (However, unlike Nikhyl, I was too burned out to stay on for a third year, and I never achieved the role of team leader.) The job is, of course, rewarding, but it is also extremely difficult. It takes tremendous dedication, compassion, and organization. It is the kind of experience that takes grit and maturity and builds grit and maturity. And Nikhyl has grit and maturity. He is a gem of a person, and I know that he has what it takes to make a great clerk. He possesses the work ethic and intellect to succeed, and the amiable disposition to make a good addition to any chambers. I hope you will give him that opportunity. If you have any further questions or need additional information, please do not hesitate to contact me.

Thank you,

/s/

Josh Bowers
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United States Department of Justice

United States Attorney
District of New Hampshire

Federal Building *(603) 225-1552*
53 Pleasant Street, 4th Floor
Concord, New Hampshire 03301

May 24, 2023

Dear Judge:

I am pleased to recommend Nikhyl Sud for a clerkship in your chambers. Nikhyl spent Summer 2022 as an intern in the United States Attorney's Office for the District of New Hampshire following completion of his 1L year. I have supervised our internship program for a number of years and was able to interact with Nikhyl and the other interns on a daily basis. Based on both my own interactions and those of my colleagues who worked with Nikhyl on numerous assignments, I can confirm he did an excellent job in all respects.

Substantively, Nikhyl was actively engaged in the work of our small but industrious criminal division. He drafted a successful pretrial detention motion in a case where the defendant was charged with illegally possessing machine guns. In another matter he wrote portions of the government's objection to suppress evidence allegedly seized in violation of the Fourth Amendment. He helped prepare another colleague for oral argument on an appeal before the First Circuit. In each of these instances, Nikhyl worked in a self-directed manner to research solutions to real problems and assist our office in its pursuit of justice. Nikhyl's writing was clear and concise. He was curious and would regularly engage me and my colleagues with questions about court proceedings in way that showed he wanted to understand and not just merely observe.

One of the highlights of our summer program is an elaborate mock trial that the interns conduct in one of the federal courtrooms. Nikhyl did an incredible job presenting the government's opening statement and in examining a couple mock witness volunteers from our office. He will certainly make a fine litigator.

Before coming to the United States Attorney's Office, I worked in private practice for a number of years and clerked on the United States District Court for the Eastern District of Pennsylvania for Judge Harvey Bartle III. Based on my experience as a law clerk and my impressions of Nikhyl from last summer, I am confident that he would make a first-rate addition to your chambers. He has outstanding legal acumen, a natural curiosity about the law, and completes assignments efficiently and effectively.

Sincerely,

Charles L. Rombeau
Assistant U.S. Attorney
District of New Hampshire

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am very pleased to recommend Nikhyl Sud for a judicial clerkship. I am the Mortimer M. Caplin Professor of Law and the Director of the Center for the Study of Race and Law at the University of Virginia. I teach and write principally in the areas of Constitutional Law, Racial Justice and Law, Employment Discrimination and Disability Law. I am honored to have served as a judicial clerk to the Honorable Cornelia G. Kennedy of the United States Court of Appeals for the Sixth Circuit (1993-'94).). As you likely well know, the University of Virginia is one of the most competitive law schools in the country with a student body of outstanding quality.

Nikhyl was in my Race and Criminal Justice course in the fall of 2022. a course I co-taught with a colleague. The class was a discussion-based seminar with just ten students so I had the opportunity to interact with and observe Nikhyl frequently. He was always well prepared and actively engaged, offering insightful questions and observations about the issues under discussion. He also came to office hours to follow up on class discussion and to discuss his idea for his final paper. That paper, titled "A Ticket to Failure: Why Students Deserve More Due Process Rights in the Face of School Suspensions," persuasively argued that the harm of short-term school suspension is underappreciated and warrants greater procedural protections. The paper was carefully researched and written, demonstrating creative and plausible arguments drawn from a variety of legal and empirical sources. He received an A-. I would note that the law school imposes a strict B+ mean on all courses so an A- is identifiably above average. Moreover, awarding 'A' grades is difficult in small courses as the mean typically requires offsetting each A with a B- or two B's.

Outside of class, Nikhyl has contributed much to the law school community. While I will let his resume speak for itself, I highlight his leadership, teaching and oral communication skills that can be traced back to his time as an award-winning teacher before law school. Nikhyl currently serves as captain of the mock trial team. He leads team practices and instructs members on how to deliver witness examinations and respond to objections. He has litigated several cases before mock juries, demonstrating his ability to think on his feet and communicate his ideas succinctly. In fact, the mock-trial team that Nikhyl led during his 1L year made the finals of the 1L Trial Advocacy Tournament.

I highly commend Nikhyl's character and personality. In class, he engaged with other students on sensitive and controversial racial issues with concern, respect and empathy. He has a disarming manner that encourages others to be candid and authentic. I very much enjoyed his visits to my office hours. I was moved by his concern for high school students accused of misconduct, even while he recalled how difficult it can be for a teacher in such circumstances. He is also easy going and our conversations often drifted pleasantly into news and personal matters.

Nikhyl is keenly interested in clerking. He knows it is a privilege to work under the guidance of a learned judge. He also aspires to be an effective litigator and looks forward to seeing the judicial process from the court's perspective. He values quality research and writing and would like to hone those skills even further.

I am confident that you would be very well served by Nikhyl Sud as your judicial clerk and that you would appreciate knowing him. Please feel free to contact me if you would like to discuss his qualifications further. My mobile number (call/text) is 434-825-1970 and my e-mail address is kfm@law.virginia.edu.

Sincerely,

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WRITING SAMPLE

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Enclosed is an excerpt of a note written for Race and Criminal Justice, a class I was enrolled in during the fall of 2022. The note examines due process rights guaranteed to students suspended for short periods. The note was not edited by others.

The excerpt begins by arguing, if a showing of harm were required for extension of due process rights, Supreme Court doctrine supports a finding that short suspensions implicate sufficient harm to compel due process. It then advances that students faced with short suspensions deserve more robust due process than offered in the Supreme Court case, Goss v. Lopez. Section I, referenced in the excerpt, but not included, presented data demonstrating the stream of harm short suspensions potentially initiate, the basis of the reasoning in Sections II and III. The stream begins with a direct negative effect on academic achievement which is correlated with reduced high-school graduation rates. Failure to graduate is linked with an increased chance of future poverty and incarceration. The full excerpt is available upon request.

II. Students Suffer Serious Harm When Suspended for Short Periods

C. Harm from Short Suspensions Should Satisfy any Due Process "Harm Standard"

The majority in Goss v. Lopez refused to require a showing of harm to extend due process guarantees to students suspended for short periods.[1] But in Justice Powell's dissent, he insisted on a "harm standard" for extension of due process, arguing students faced with short suspensions experience injury that "is too speculative, transitory, and insubstantial to justify imposition of a constitutional rule."[2] This section will advance, even if the majority employed Justice Powell's harm requirement for extension of due process, the harsh consequences of short suspensions outlined in Section I would likely have led the Court to require due process regardless.

First, consider the harm short suspensions inflict on educational attainment examined in Section I. Traditionally, the Supreme Court has held a student's ability to achieve an education in high regard. In Brown v. Board of Ed., the Court framed its belief in the "importance of education to our democratic society,"[3] as well as its doubt that "any child may reasonably be expected to succeed in life if [they are] denied the opportunity of an education."[4] The Court additionally acknowledged segregated schools "deprive [black students] of some of the benefits they would receive in a racially integrated school".[5] Ultimately, segregation was unanimously outlawed due to its inherent unequalness.[6]

While not as morally abhorrent as segregation, race pervades suspension data, with Black students experiencing 4 times as many suspensions as their White peers.[7] Moreover, short

[1] See 419 U.S. 565 (1975).
[2] 419 U.S. 565, 586 (Powell, J., dissenting) (1975).
[3] 347 U.S. 483, 493-95 (1954).
[4] Id.
[5] Id.
[6] See id.
[7] See supra notes xx-xx and accompanying text.

suspensions inflict harm on students the Brown Court was intent on preventing. Owing to the fact students are removed from the classroom, short suspensions deny students the opportunity and benefit of an education in the time they serve their suspension. As the data presented in Section I displayed, higher educational attainment demonstrated by unsuspended students reflect this denial of education,[8] pointing to harmful unequalness of outcomes exactly like the Court was attempting to eradicate in segregated schools.[9]

While a uniquely famous opinion, the Court has asserted its support for students throughout history, from holdings providing students with discounted transportation, to opinions recognizing teachers direct a child's ultimate destiny.[10] The veneration the Court shows for education exhibited by its efforts to prevent harm to a student's ability to achieve an education is, on its own, a powerful claim in favor extending due process rights to students suspended for short periods, who demonstrate academic disadvantage compared to their unsuspended peers.[11]

But the harm suffered by students suspended for less than ten days fails to end at a lower rate of scholastic proficiency. The data examined in Section I established that students who struggle academically are more likely to drop out, and individuals who fail to graduate experience a higher likelihood of ending up in poverty.[12] Poverty, admittedly, does not implicate an "interest" outlined in the Due Process Clauses.[13] But, the harm poverty inflicts has moved the

[8] See Lacoe & Steinberg, supra note xx, at 40.
[9] 347 U.S. 483, 493 (1954).
[10] See Interstate Consol. St. Ry. Co. v. Commonwealth of Massachusetts 207 U.S. 79, 87 (1907) (where the Supreme Court upheld a Massachusetts law requiring pupils be charged a lower price when transported to and from public schools, in part, because education is "recognized… as one of the first objects of public care"); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary 268 U.S. 510 (implying those who educate a child have the ability to "direct [the child's] destiny"). See also, Meyer v. Nebraska 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted"); School Dist. Of Abington tp., Pa. v. Schempp 274 U.S. 203, 230 (Brennan, J., concurring) (1963) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government").
[11] See supra notes xx-xx and accompanying text.
[12] See supra notes xx-xx and accompanying text.
[13] See U.S. Const. amend. XIV, § 1.

Court to provide due process. In Goldberg v. Kelly, the Court was sensitive to the fact those in poverty rely on welfare payments to provide for their families.[14] Considering that reliance, the Court elected to extend robust due process to individuals facing termination of welfare payments.[15] As such, the proposition that harm caused by poverty ought to be weighed in the universe of due process is not novel.

Opponents may argue that a student suspended for a short period is not immediately and certainly subject to a future in poverty. However, neither were the plaintiffs in Goldberg.[16] In Goldberg, the Court was sensitive to the likelihood plaintiffs would experience abject poverty if welfare payments were discontinued, without regard for whether poverty was certain for a particular individual.[17] Bearing in mind that increased likelihood, the Court elected to extend due process.[18] Indeed, losing welfare payments involves a more casual relationship with poverty than low graduation rates linked to short suspensions.[19] But Goldberg stands for the proposition that a higher likelihood of poverty can be perceived as harmful enough to warrant due process rights. Thus, if a showing of harm is required for a guarantee of due process, the increased chance of poverty in the potential downstream consequences of short suspensions carries harm that deserves deliberation in the due process inquiry.

Incarceration, the last ultimate potential consequence of low academic achievement resulting from short suspensions does not implicate a property interest like that of education, but a liberty interest.[20] The rights of criminal defendants facing incarceration are so critical to society that the Constitution outlines them in detail, refusing to leave them up to the interpretation of the

[14] See Goldberg v. Kelly 397 U.S. 254, 258 (1970).
[15] See id.
[16] See id. at 260.
[17] See id. at 265.
[18] See id.
[19] See id.
[20] For a discussion of what constitutes a deprivation of a liberty interest, see 16C C.J.S. Constitutional Law § 1887.

Due Process Clauses.[21] This fact already lends strong support that the existence of incarceration in the downstream consequences of suspensions poses enough potential harm for due process.

Additionally, there exist situations outside of initial trial and incarceration for which the Constitution does not contain explicit procedures where the Court has acknowledged enough harm exists for the Due Process Clauses to trigger. For example, in Morrissey v. Brewer, the Supreme Court held procedural due process demanded hearings before parole could be revoked and an individual placed back in custody.[22] The Court, sensitive to the serious infringement on liberty incarceration entailed, held even a hearing scheduled for a later date after an individual was put back into custody was too late.[23] In line with Supreme Court precedent, S.D. NY cited the fact taking away temporary release programs constituted a "well-recognized" grievous loss of liberty in support of their decision to require due process.[24] Similar to temporary release programs, Wolff v. McDonnel extended due process to prisoners in hearings concerning their accrual of good-time or imposition of solitary confinement.[25]

These cases illustrate when incarceration is implicated in a situation, sufficient harm is often found, demanding due process. Admittedly, similar to the discussion of poverty, short suspensions do not immediately and directly implicate incarceration. But extensive documentation of the school-to-prison pipeline,[26] and the effects of low academic achievement on the likelihood of being incarcerated in the future, at the very least, add support to the

[21] See, e.g., U.S. Const. amend. V; U.S. Const. amend. VI.
[22] Morrissey v. Brewer, 408 U.S. 471, 471 (1972).
[23] Id. at 471-72.
[24] 572 F.2d 393, 398 (2d Cir. 1978).
[25] Wolff v. McDonnell, 418 U.S. 539, 543-44 (1974). Good-time accrual allows prisoners to collect "days" off their sentence for good behavior while incarcerated. See Melisa Pacheco & Christopher Birkbeck, Good Time and Programs for Prisoners 3-18, (Crim. and Juv. Just. Coordinating Council, Working Paper No. 3, 1996), https://nmsc.unm.edu/reports/1996/GoodTimePrograms.pdf.
[26] See Mary Allen Flannery, The School-to-Prison Pipeline: Time to Shut it Down, NAT'L EDUC. ASSOC., Jan. 2015, https://www.nea.org/advocating-for-change/new-from-nea/school-prison-pipeline-time-shut-it-down.

contention that short suspensions cause enough possible harm for due process to apply.[27] But the argument likely need not reach the incarceration stage of negative consequences associated with short suspensions, considering the direct effect short suspensions inflict on a student's ability to achieve an education. This fact alone should reflect sufficient harm necessary to meet a harm standard for due process.

III. The Guarantees of Procedural Due Process Outlined in Goss Do Not Go Far Enough

A. The Magnitude of the Harm Students Face After Short Suspensions Requires More Robust Due Process

Section I and II demonstrated students suffer sufficient harm to require due process guarantees when faced with suspensions under ten days. Whether due process should be extended is, therefore, a foregone conclusion. An equally vital inquiry, however, is the nature of due process extended. In assessing what process to offer students suspended less than ten days, the Goss majority rejected robust due process, offering only a vague guarantee that "students facing suspension… must be given some kind of notice and afforded some kind of hearing."[28] Minimal clarification of those guidelines was advanced a few sentences later, with the Court asserting "oral or written notice of the charges against [students must be provided] and, if [the student] den[ies] them, an explanation of the evidence the authorities have and an opportunity to present [their] side of the story."[29] Instead of elucidating how notice must be delivered, or what information must be contained within, the Court failed to develop any meaningful

[27] See supra notes xx-xx and accompanying text.
[28] Goss v. Lopez, 419 U.S. 565, 579 (1975).
[29] See id.